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1998]

Notes

LIMITING OPERATOR LIABILITY FOR PARENT CORPORATIONS UNDER CERCLA:

UNITED STATES *v.* CORDOVA CHEMICAL CO.

I. INTRODUCTION

During the nineteenth century, the industrial revolution changed the United States from an agrarian country to an industrial giant.¹ The population grew dramatically, transportation markedly improved and the factory became an integral part of the budding national economy.² One aspect of industrialization was the rise of the corporation and, with it, limited corporate liability.³

1. See ALAN BRINKLEY ET AL., *AMERICAN HISTORY: A SURVEY* 198, 513 (8th ed. 1991) (reviewing change in America from "simple, agrarian republic" to "the first manufacturing nation of the world").

2. See BRINKLEY ET AL., *supra* note 1, at 252 (analyzing aspects of economic change in 1820s and 1830s). Population growth was one characteristic of industrialization in America. See *id.* During the nineteenth century, the population doubled roughly every 25 years, growing from approximately four million in 1790 to over 31 million by 1860. See *id.* This growth continued through the industrial revolution into the twentieth century, with the population reaching more than 76 million people by the turn of the century. See *id.* at 542. The population of the United States more than doubled again in the twentieth century and currently is over a quarter of a billion people. See DONALD WORSTER, *THE WEALTH OF NATURE: ENVIRONMENTAL HISTORY AND THE ECOLOGICAL IMAGINATION* 6 (1993).

Another characteristic of American industrialization was marked improvements in modes of transportation. See BRINKLEY ET AL., *supra* note 1, at 255-56 (discussing that as result of industrialization, improvements were made in nation's roads and waterways, increasing travel). Improvements in transportation aided the development of markets throughout the United States as merchants were able to transport their goods more conveniently to distant markets. See *id.* at 256 (analyzing effect of Philadelphia-Pittsburgh turnpike and similar transportation improvements on market development). Improvements in roads and waterways also accompanied improved means of transportation, including the railroad and the automobile. See *id.* at 258, 515-16 (discussing development of railroad and invention of automobile as indicators of industrial growth); WORSTER, *supra*, at 7 (finding that automobile "dramatically symbolized the industrial economy").

A final characteristic of industrialization was the rise of the factory as the predominant method of producing goods and, with it, the development of industrial technology. See BRINKLEY ET AL., *supra* note 1, at 260 (finding that "increasing population, improved transportation, and the expansion of business activity—contributed to perhaps the most profound economic development in mid-nineteenth-century America: the rise of factory manufacturing"). With the rise of the factory came developments in industrial technology, including the invention of electricity, the development of steel and the use of petroleum. See *id.* at 514-15.

3. See Kathryn R. Heidt, *Liability of Shareholders Under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)*, 52 OHIO ST. L.J. 133, 136 (1991) (discussing origins of corporations and limited corporate liability). Corpo-

The principles of limited corporate liability provide that stockholders of a corporation, whether individual or corporate, are not personally liable for the obligations of the corporation.⁴ Courts regard the corporation

rations in the United States are "largely a product of developments in the latter part of the nineteenth and the early part of the twentieth centuries," specifically industrialization. ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS IN A NUTSHELL* § 1.4, at 12 (4th ed. 1996). Before that time, the predominant business entity was the unincorporated joint stock company, which primarily conducted local business. See 1 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2, at 7 (perm. ed. rev. vol. 1990); HAMILTON, *supra*, § 1.4, at 7 (finding business prior to late nineteenth century tended to be "local in nature and of primary concern to individual states"). As the country industrialized, however, the corporation gained favor because "it could raise large amounts of capital from numerous investors and yet provide centralized direction of large industrial concerns." *Id.*; see E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1354 (1948) (noting that corporation arose out of "[t]he need for assembling capital for improving inland transportation facilities, for supplying cities and towns with water, and for carrying on banking and insurance . . . which came to be felt immediately after the close of the Revolution"). Large amounts of capital and centralized management were particularly necessary for factory manufacturing, and therefore, as modern machinery developed and manufacturing moved from the home to the factory, the "corporate device" also became prevalent. See *id.* at 1354-55 ("The need to pool the capital of a number of persons for manufacturing purposes is unlikely to be felt unless manufacture is to be carried on in a factory."). See generally HENRY WINTHROP BALLANTINE, *BALLANTINE ON CORPORATIONS* § 9, at 37-41 (rev. ed. 1946) (discussing history and evolution of state general corporation acts); HARRY G. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* §§ 4-12, at 8-19 (1961) (analyzing historical background of corporations).

As corporations developed in the United States, so, eventually, did limited liability. See Dodd, *supra*, at 1356 (discussing origins of limited liability). In the early nineteenth century, many states included a provision in corporate charters providing for unlimited personal liability for a corporation's shareholders. See *id.* at 1352 ("All of the New England states at one time or another adopted a policy of granting manufacturing corporation charters in large numbers, while coupling the grants with provisions for unlimited shareholder liability."). By the 1850s, however, most states provided for limited liability in an effort to encourage incorporation and investment in their states. See *id.* at 1368 (discussing "flight-of-capital" as reason for abandoning unlimited corporate liability); see also Constance S. Chandler & Rebecca J. Grosser, Comment, *An Issue Ripe for Supreme Court Review: Whether Congress Intended to Alter the Common Law Principles of Corporate Limited Liability When Enacting CERCLA*, 4 MO. ENVTL. L. & POL'Y REV. 14, 14 (1996) ("The concept of limited liability was established to insulate corporate owners from the risks associated with owning a business, thereby, allowing commerce and free enterprise to flourish."). For the most part, new states adopted limited liability, and by the early twentieth century, limited liability was the rule in all 50 states. See Ronald G. Aro-novsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 430 (1990) (noting that although some states retained forms of shareholder liability provisions, for most of this century, limited liability has been general rule).

4. See FLETCHER ET AL., *supra* note 3, § 25, at 512 (finding that liabilities of corporation are not same as those of shareholders individually and severally); HENN, *supra* note 3, § 146, at 207-09 ("Incorporation for the purpose of achieving limited liability is recognized in most jurisdictions on the theory that limited liability is one of the principle objectives of incorporation."); Chandler & Grosser, *supra* note 3, at 14 (discussing limited liability as protecting stockholders from personal

as a separate entity, apart from its shareholders, which is protected by a corporate veil.⁵ Similarly, courts limit investors' liability for the corporation's actions to their investment in the company's stock.⁶ In rare circumstances, when a corporation is the sole or majority shareholder of another corporation and the parent corporation treats the subsidiary corporation as its "alter ego" or a "mere instrumentality," a court will pierce the corporate veil and hold the parent corporation liable for the obligations of its subsidiary.⁷

In addition to the proliferation of corporations, another consequence of industrialization was environmental degradation and contamination from hazardous industrial waste, which was caused by the growing population, improvements in transportation and the use of the factory.⁸ Environ-

liability, unless they participate in liability-creating conduct, either actively or passively).

5. See FLETCHER ET AL., *supra* note 3, § 25, at 512 ("It is generally accepted that the corporation is an entity distinct from the shareholders . . ."); HENN, *supra* note 3, § 68, at 75 ("For most purposes, the corporation is treated as an entity."); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 Nw. U. L. REV. 259, 295 (1992) (noting that corporation is considered separate from its shareholders); Chandler & Grosser, *supra* note 3, at 14 ("[A] parent corporation is typically regarded as an entity distinct from its subsidiaries."). One commentator noted that "[a] 'subsidiary corporation' is one which is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of the capital stock. Notwithstanding two corporations may be so related, each is deemed to have an independent existence." FLETCHER ET AL., *supra* note 3, § 25, at 513.

6. See WILLIAM W. COOK, *THE PRINCIPLES OF CORPORATION LAW* 19 (1925). Cook noted:

It is a principle of law, coeval with the existence of corporations having a capital stock, that, unless the corporate charter or a constitutional statute provided otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable for and cannot be made to pay any sums in addition thereto.

Id.; see Aronovsky & Fuller, *supra* note 3, at 431 (noting that shareholder's liability is limited to investment in corporation); Andrew S. Hogeland & Mary Griffin, *Environmental Liabilities of Successor and Parent Corporations Under CERCLA*, BOSTON B.J., Mar.-Apr. 1991, at 6, 6 (discussing traditional limited liability principles in context of parent corporation CERCLA liability).

7. See FLETCHER ET AL., *supra* note 3, § 41, at 602-03 ("Practically all authorities agree that under some circumstances in a particular case the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party . . ."); HENN, *supra* note 3, § 143, at 205 (noting general rule is to treat corporation as separate entity, but "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons"); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) ("'Piercing' seems to happen freakishly. Like lightning, it is rare, severe, and unprincipled."); Sung Bae Kim, *A Comparison of the Doctrine of Piercing the Corporate Veil in the United States and in South Korea*, 3 TULSA J. COMP. & INT'L L. 73, 74 (1995) (noting that treating subsidiary corporation as "alter ego" or using it to perpetrate fraud will cause court to pierce corporate veil).

8. See WORSTER, *supra* note 2, at 6-7 (identifying population growth, improvements in transportation and growth of technology as causes of environmental de-

mental protection and remediation became a national concern in the 1960s and the public awareness of such environmental issues heightened over the next two decades.⁹ In 1980, in response to the growing concern

struction). First, the population growth that began in the industrial revolution has caused general overpopulation, as well as specific environmental problems. *See id.* (noting that average density of United States is 70 persons per square mile, compared with global average of 100 per square mile); *see also* EVA H. HANKS ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW AND POLICY 93 (1974) (describing environmental aspects of population problem). What has been deemed the population problem manifests itself in many forms detrimental to the environment, including occupation of open spaces, increased consumption of natural resources, disproportionate concentrations of people in urban areas and the generation of more waste. *See id.*

Second, environmental contamination can also be attributed to improvements in transportation, specifically the invention and proliferation of the automobile. *See* WORSTER, *supra* note 2, at 7. One commentator noted that "[t]hroughout America and the rest of the industrial world, the automobile has become the most common and the most potent technological force for environmental modification and destruction we have, voraciously consuming wood, aluminum, steel, rubber, plastic, farmland, city space, wetlands, quiet." *Id.*

Third and finally, just as the increases in population and improvements in transportation gave rise to the factory, these factors also contribute to the environmental contamination caused by factories. *See* SAMUEL S. EPSTEIN ET AL., HAZARDOUS WASTE IN AMERICA 6-8 (1982) (discussing "the hazardous waste problem"). Manufacturing goods, such as the automobile, produces by-products, and the amount of waste generated by factories necessarily increases in relation to the levels of production, determined in part by population size. *See id.* at 6 ("Every process for producing useful things—food, clothing, equipment, drugs, and housing—also produces materials that are not generally regarded as useful."). Although most industrial waste is harmless, a small percentage of waste is considered hazardous. *See id.* (comparing annoying, but "hardly dangerous," rice straw with toxic cyanide wastes from gold refining). Commentators have recognized that "[s]ince hazardous wastes are not useful to the industry producing them, they have typically been disposed of in the easiest and cheapest way—by dumping them somewhere convenient." *Id.* One commentator noted:

Before the era of environmental regulation arrived, untreated toxic wastes were discharged directly into public waterways, hazardous wastes were dumped indiscriminately, and all manner of pollutants were spewed into the air. Such practices have been especially damaging in the United States, which consumes a huge percentage of the world's resource[s]—and therefore produces a huge percentage of the world's pollution—relative to its population.

NEIL STOLOFF, REGULATING THE ENVIRONMENT: AN OVERVIEW OF FEDERAL ENVIRONMENTAL LAWS 1 (1991). The problem now is "how to ensure that those who generate such hazardous wastes do not simply dump them, but handle them in a way that prevents them from creating public health or environmental problems." EPSTEIN ET AL., *supra*, at 7.

9. *See* BRINKLEY ET AL., *supra* note 1, at 985 (discussing "the new environmentalism" and increased public concern over environmental protection). Concern about the environment and preservation efforts date back at least to the late nineteenth century. *See* STOLOFF, *supra* note 8, at 2 (finding "environmental ethic" present early in nation's history); *see also* PETER J. BOWLER, THE NORTON HISTORY OF THE ENVIRONMENTAL SCIENCES 203 (1992) (finding evidence of environmental conscience in late nineteenth century with creation of Yellowstone as first national park); BRINKLEY ET AL., *supra* note 1, at 985 ("Public concerns about the environment had arisen intermittently since the beginning of the industrial era . . .").

over the environment, specifically the improper disposal of hazardous

During the early twentieth century, President Theodore Roosevelt aggressively supported conservation efforts because he was concerned about and dedicated to preventing "the unregulated exploitation . . . of what remained of the nation's wilderness." *Id.* at 644; see STOLOFF, *supra* note 8, at 2 ("Theodore Roosevelt equated America's 'natural' resources with its 'national' resources."). During his presidency, Roosevelt created the National Forest Service and appointed conservationist Gifford Pinchot as its first director. See BRINKLEY ET AL., *supra* note 1, at 645 (noting Pinchot "supported rational and efficient human use of the wilderness"). Also at this time, naturalist John Muir founded the Sierra Club, an organization "committed to protecting the natural beauty of the land and the health of its wildlife from human intrusion." *Id.*

Over the next few decades, environmental activism slowed, but returned with growing intensity in the 1960s due in part to Rachel Carson's book *Silent Spring*. See *id.* at 985 (discussing *Silent Spring* and noting that it was one of most controversial books of 1960s, but served to raise awareness about environmental issues); see also BOWLER, *supra*, at 504 ("Fear of environmental degradation began in the mid nineteenth century . . . but did not become a major concern for most people until the later decades of the twentieth."). Environmental disasters such as the Love Canal in New York, the closing of the James River in Virginia because of pesticide contamination and Valley of the Drums in Kentucky emphasized the severity of the pollution problem and made it clear that improper disposal of hazardous waste could have serious consequences, both to the population and the environment. See Jay Sandvos, Comment, *CERCLA Arranger Liability in the Eighth Circuit: United States v. TIC Industries*, 24 B.C. ENVTL. AFF. L. REV. 863, 867 (1997) (stating that it became "clear that improper handling and disposal of hazardous substances could result in substantial adverse effects to both the environment and to human populations"); see also BOWLER, *supra*, at 510 ("The twentieth century has seen a massive increase in the general public's awareness of the damage being done to the environment by human activities, and an increasingly militant demand that something be done to halt the destruction."); EPSTEIN ET AL., *supra* note 8, at 37, 67 (noting that "[a]wareness of the hazardous waste disposal problem . . . dramatically increased" as result of Love Canal and noting that at "'Valley of the Drums,' between seventeen thousand and one hundred thousand drums of waste were dumped illegally . . . left to rot, spilling their dangerous contents into a local creek"); John M. Brown, Comment, *Parent Corporation's Liability Under CERCLA Section 107 for the Environmental Violations of Their Subsidiaries*, 31 TULSA L.J. 819, 819 n.2 (1996) ("'At the Valley of the Drums [located in Kentucky], thousands of barrels were stacked illegally in the hauler's backyard . . . in a seriously deteriorating state . . . [S]ome have already burst and spilled their contents on the ground.'" (alterations in original) (quoting H.R. REP. NO. 96-1016, at 18-19 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6121)). Congress responded to these and other environmental problems in the 1970s by enacting legislation that recognized the need to preserve the environment and by creating the Environmental Protection Agency (EPA). See STOLOFF, *supra* note 8, at i, 1 (noting that environmental disasters created "ecological imperative," to which Congress responded with "far-reaching laws" and creation of EPA and stating that "[i]n the 1970s, the freedom of industry to pollute free of charge came to an end"); LETTIE M. WENNER, *THE ENVIRONMENTAL DECADE IN COURT* 1 (1982) (noting congressional finding for National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1994), enacted in 1970, was that "'[t]he Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.'" (quoting 42 U.S.C. § 4331(c) (1994))); see also CHARLES T. RUBIN, *THE GREEN CRUSADE: RETHINKING THE ROOTS OF ENVIRONMENTALISM* 6 (1994) (noting that environmental awareness increased in public mind as well as in political consciousness).

waste and its disastrous effects on the environment, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹⁰

Congress enacted CERCLA “to address the increasing environmental and health problems associated with inactive hazardous waste sites.”¹¹ It is a remedial statute that provides for a strict, joint and several liability scheme.¹² When a release of hazardous substances requires the expenditure of funds in response, any person that qualifies as a responsible party is liable for the costs to remove the hazardous substances or remediate the site and any other necessary costs and damages for injury to or loss of

10. 42 U.S.C. §§ 9601-9675 (1994). CERCLA was enacted in the closing days of the lame-duck term of the 96th Congress. See Aronovsky & Fuller, *supra* note 3, at 421 (noting that CERCLA was “a hurried measure to address the emerging problem associated with the cost of cleaning up the nation’s hundreds of leaking hazardous waste disposal sites”); Sandvos, *supra* note 9, at 868. Although there is extensive legislative history on earlier versions of the bill in each house, the actual statute has little legislative discussion as it was “the rushed product of last-minute compromises.” *Id.*; see ENVIRONMENTAL LAW INST., SUPERFUND: A LEGISLATIVE HISTORY xiii (Helen Cohn Needham & Mark Menefee eds., 1982) (noting that “last-minute compromise hampers the ability of researchers to draw definitive conclusions from the otherwise extensive legislative history of CERCLA,” but nevertheless shows congressional concerns that resulted in CERCLA’s enactment); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) (“The version passed by both Houses . . . was an eleventh hour compromise put together primarily by Senate leaders and sponsors of the earlier Senate version.”). One court noted:

CERCLA was enacted on December 11, 1980 in the last days of the 96th Congress. The final version of the Act was conceived by an ad hoc committee of Senators who fashioned a last minute compromise which enabled the Act to pass. As a result, the statute was hastily and inadequately drafted. The only legislative history on the compromise is found in the floor debates.

United States v. A & F Materials Co., 578 F. Supp. 1249, 1253 (S.D. Ill. 1984) (citing 126 CONG. REC. 30,930-87 (1980); 126 CONG. REC. 31,964-82 (1980)). Nevertheless, the legislative history that is available is a useful guide to Congress’ intentions in enacting CERCLA, as it contains many provisions that appeared in or closely resembled earlier versions of the bill in both houses. See *Shore Realty*, 759 F.2d at 1040 (noting one sponsor’s claim that “the version passed ‘embodie[d] those features of the Senate and House bills where there has been positive consensus’ while ‘eliminat[ing] those provisions which were controversial’” (quoting 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph))).

11. Brown, *supra* note 9, at 819 (quoting *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir. 1992)); see Aronovsky & Fuller, *supra* note 3, at 422 (“The leading objective of CERCLA is decisive action to begin the process of remediating the nation’s leaking hazardous waste sites.”); Heidt, *supra* note 3, at 149-50 (“Congress enacted CERCLA in 1980 to clean up and otherwise protect the public from sites contaminated with hazardous substances and to provide a fund to support cleanup and related measures.”).

12. See Aronovsky & Fuller, *supra* note 3, at 425 (“CERCLA was intended presumptively to impose strict, joint and several liability on responsible parties as defined in section 107(a) of the statute.”); Heidt, *supra* note 3, at 153 (“[CERCLA] [l]iability is strict liability”); Sandvos, *supra* note 9, at 869 (“[C]ourts consistently have interpreted CERCLA as creating strict, joint, and several liability.”).

natural resources.¹³ Responsible parties under CERCLA include the present "owner and operator" of a facility, the past "owner or operator," anyone who arranges for disposal of hazardous substances and any person who accepts such waste for transport.¹⁴

Congress enacted CERCLA to provide a mechanism for the cleanup of hazardous substances and to impose financial responsibility on private responsible parties as opposed to the taxpayers.¹⁵ When an immediately responsible corporation is incapable of paying its share of cleanup costs, imposing financial responsibility on that company's owner, such as holding a parent corporation liable for the environmental wrongs of its subsidiary, furthers CERCLA's goals.¹⁶ This broad liability scheme, however, seems to be at odds with the fundamental principle of limited liability for parent corporations, and the statute does not expressly resolve this conflict.¹⁷ Therefore, in cases involving parent corporation liability for the environmental actions of its subsidiary, courts are left to interpret the ap-

13. See 42 U.S.C. § 9607(a) (1994) (defining persons liable under CERCLA); see also Theodore L. Garrett, *Superfund Liability and Defenses: A 1992 Primer*, NAT. RESOURCES & ENV'T, Winter 1992, at 3, 3-4 (describing basic liability provisions of CERCLA).

14. See 42 U.S.C. § 9607(a)(1)-(4) (defining potentially responsible parties under CERCLA).

15. See H.R. REP. NO. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 (discussing provisions within statute which ensure both that contaminated sites will be cleaned up and responsible parties will pay); 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (stating liability scheme under statute "assures that the costs of chemical poison releases are borne by those responsible for the releases"); Aronovsky & Fuller, *supra* note 3, at 422-23 ("One of the fundamental policies underlying CERCLA is to accomplish . . . [the] goal [of remediating hazardous waste sites], to the maximum extent possible, at the expense of private responsible parties rather than the taxpayers."); Chandler & Grosser, *supra* note 3, at 14 ("The statute aims to achieve prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the pollution.").

16. See Aronovsky & Fuller, *supra* note 3, at 422-23 (noting that holding parent corporation liable when responsible subsidiary is unable to pay amount it owes accomplishes fundamental policy of CERCLA to remediate hazardous waste sites at expense of private responsible parties).

17. See Sandvos, *supra* note 9, at 864 ("One fundamental problem of CERCLA interpretation is how to harmonize CERCLA's broad scheme of strict, joint, and several liability with the primary canons of torts and corporations law on which the statute overlays."); see also Aronovsky & Fuller, *supra* note 3, at 423 (finding that imposing liability on parent corporations furthers CERCLA's goals, but "[o]n its face, . . . this approach violates a fundamental principle of the law of corporations—that shareholders, be they individual or corporate, are liable for no more than the amount of their investment in the corporation"). Although Congress expressly intended to hold responsible parties financially liable for remediation of hazardous waste sites, the statute and legislative history are silent as to the interaction of this liability scheme and the liability scheme for parent corporations. See Brown, *supra* note 9, at 820 ("[I]t is unclear whether parent corporations can be held liable as potentially responsible parties for the acts of their subsidiary corporations because CERCLA never expressly refers to parent or subsidiary corporations.").

propriate liability standard.¹⁸

It was in this context that the United States Court of Appeals for the Sixth Circuit decided *United States v. Cordova Chemical Co.*¹⁹ and adhered to the traditional corporation law doctrine of limited liability by adopting a veil piercing test for parent corporation liability under CERCLA.²⁰ This Note suggests that, to the contrary, parent corporations should be directly liable for the actions of their subsidiaries if the parent's conduct constitutes actual control over its subsidiary.²¹ This broad interpretation of operator liability is in accord with the statutory language of CERCLA and congressional intent.²² Part II of this Note discusses CERCLA liability in general, as well as the three judicially created standards for holding a parent corporation liable as an operator.²³ Part III examines the Sixth Circuit's en banc decision in *Cordova Chemical*, in which the court adopted a "piercing the corporate veil" standard for holding a parent corporation liable as an operator for the activities of its subsidiary.²⁴ Part IV advocates that the Sixth Circuit erred in adopting an indirect liability standard and, instead, should have followed the majority of circuits and adopted a direct liability standard, imposing operator liability on a parent company when it exercises pervasive control over its subsidiary.²⁵ Finally, Part V of this Note concludes by discussing the probable impact of the Sixth Circuit's decision.²⁶

18. See Chandler & Grosser, *supra* note 3, at 14 ("When considering the liability of parent corporations for the environmental torts of their subsidiaries, the issue is often whether the applicable standard of liability derives from direct application of the statutory definitions of CERCLA or from common law principles of corporate law."); see also Hogeland & Griffin, *supra* note 6, at 6 ("[J]udicial decisions continue to define the point at which the environmental liabilities of the owner or operator of a site contaminated by hazardous waste may be imposed on successor or parent companies.").

19. 113 F.3d 572 (6th Cir.) (en banc), *cert. granted*, 118 S. Ct. 621 (1997).

20. *Id.* at 580 (holding "that where a parent corporation is sought to be held liable as an operator . . . based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met").

21. For a discussion of actual control as the standard adopted by numerous circuit courts, see *infra* notes 63-97 and accompanying text.

22. For a discussion of the statutory language of CERCLA, as well as Congress' intent in enacting the statute, see *infra* notes 182-229 and accompanying text.

23. For a discussion of the basic statutory provisions of CERCLA, as well as the three recognized standards for parent corporation operator liability, see *infra* notes 27-49, 63-109 and accompanying text.

24. For a discussion of the United States Court of Appeals for the Sixth Circuit's decision in *United States v. Cordova Chemical Co.*, see *infra* notes 110-60 and accompanying text.

25. For a discussion of how the Sixth Circuit erred in adopting a piercing the corporate veil test and why it should have adopted the actual control standard, see *infra* notes 161-264 and accompanying text.

26. For a discussion of the impact of *Cordova Chemical*, see *infra* notes 265-71 and accompanying text.

II. BACKGROUND

A. CERCLA

Congress enacted CERCLA in 1980 "in an effort to address perceived inadequacies of earlier environmental legislation."²⁷ Congress recognized

27. Chandler & Grosser, *supra* note 3, at 14; see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985) ("CERCLA was designed 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.'" (quoting FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 568 (1984))); Oswald & Schipani, *supra* note 5, at 264 (noting that Congress enacted CERCLA to remedy prospective outlook problem of Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994)). Before 1980, RCRA was the primary source of hazardous waste legislation. See Oswald & Schipani, *supra* note 5, at 264 (noting that before 1980, RCRA "had been the primary statute governing hazardous wastes"). The biggest shortcoming of RCRA, according to Congress, was its entirely "prospective outlook," addressing current and future hazardous waste disposal issues, but offering no remedy for previously contaminated sites. *Id.*; see H.R. REP. NO. 96-1016, at 22 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6125 (including as deficiency of RCRA that "[t]he Act is prospective and applies to past sites only to the extent that they are posing an imminent hazard," and concluding that even in those situations, "the Act is of no help if a financially responsible owner of the site cannot be located").

CERCLA improves upon RCRA and other earlier environmental legislation in three ways. See Chandler & Grosser, *supra* note 3, at 15. First, the President has the authority to seek an injunction to force a responsible party to clean up a hazardous waste site or spill that poses "an imminent and substantial danger to the public health or welfare." Oswald & Schipani, *supra* note 5, at 265 (quoting 42 U.S.C. § 9604(a)(1) (1994)). Section 9604 of CERCLA provides:

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a)(1). The President delegated this power to the EPA by authorizing it to order responsible parties to remediate contaminated facilities. See Oswald & Schipani, *supra* note 5, at 265 n.24 (citing Exec. Order No. 12,316, 3 C.F.R. § 168 (1982), as amended by Exec. Order No. 12,418, 3 C.F.R. § 187 (1983)).

Second, CERCLA improves upon previous environmental legislation by imposing strict, joint and several liability, ensuring that responsible parties will be financially liable for cleanup costs. See *id.* at 265 n.27 (noting remarks of CERCLA sponsor, Representative James Florio). Representative Florio stated that "a strong liability scheme will insure that those responsible for releases of hazardous substances will be held strictly liable for costs of response and damages to natural resources." 126 CONG. REC. 31,964 (1980) (statement of Rep. Florio).

Third and finally, Congress ensured remediation of past, present and future contaminated sites by creating the "Superfund," a "trust fund used by the EPA to cover the expenses associated with the immediate cleanup of hazardous substances before contribution by the responsible parties who are unable to pay the costs of

two fundamental goals in enacting CERCLA: "(1) to provide for cleanup if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these cleanups."²⁸

cleanup or cannot be found." Chandler & Grosser, *supra* note 3, at 15; see S. REP. NO. 96-848, at 13 (1980) (noting Superfund is "a fund to finance response action where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup and compensation"); see also *Shore Realty*, 759 F.2d at 1041 (noting that "EPA can use Superfund resources to clean up hazardous waste sites and spills" while, at same time, "sue for reimbursement of cleanup costs from any responsible parties it can locate, . . . allowing the federal government to respond immediately while later trying to shift financial responsibility to others").

Congress appropriated over \$1.6 billion for the Superfund in 1980 for five years, \$8.5 billion more when Congress amended the statute in 1986 for the five-year period beginning on October 17, 1986, and not more than \$5.1 billion for the period from October 1, 1991 to September 30, 1994. See 42 U.S.C. § 9611(a) (1994) (defining uses of fund). The President, acting through the EPA, is authorized to use the fund for purposes such as (1) assessing short- and long-term injury to, destruction or loss of natural resources caused by a hazardous substance release; (2) funding efforts to restore, rehabilitate or replace any natural resources injured by a release; (3) funding programs to identify, investigate and prevent hazardous substance releases; (4) undertaking studies as to the long-term effects of releases; and (5) developing safety measures for employees responding to hazardous substance releases, among others. See *id.* § 9611(c)(1)-(14). Use of the Superfund, however, is subject to certain enumerated limitations. See *id.* § 9611(d)(1)-(2). For example, the fund cannot be used to compensate parties injured by releases when all of the damage occurred entirely before December 11, 1980, and cannot be used to pay claims when the injuries resulted from long-term exposure to ambient air pollutants from multiple sources. See *id.*

28. H.R. REP. NO. 99-253, pt. 3, at 15 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3038; see Richard B. Stewart & Bradley M. Campbell, *Lessons from Parent Liability Under CERCLA*, NAT. RESOURCES & ENV'T, Winter 1992, at 7, 7 ("The rationale typically associated with CERCLA is that it 'both provides a mechanism for cleaning up hazardous waste sites . . . and imposes the costs of the cleanup on those responsible for the contamination.'" (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989))); see also Chandler & Grosser, *supra* note 3, at 14 (recognizing that CERCLA "aims to achieve prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the pollution"); Tricia R. Russo, Note, *FMC Corp. v. United States Department of Commerce: An Overexpansion of "Operator" Liability Under CERCLA*, 7 VILL. ENVTL. L.J. 157, 157 (1996) (stating that "[c]leanup of hazardous waste sites is [CERCLA's] top priority"); Sandvos, *supra* note 9, at 868 (noting that Congress tried to achieve these two general goals in CERCLA); William B. Johnson, Annotation, *Liability of Parent or Successor Corporation, or Corporate Shareholders, in Action Pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (42 U.S.C.A. §§ 9601-9675), 121 A.L.R. FED. 173, 185 (1994) (noting Congress' goals in enacting CERCLA). CERCLA's rationale "equates the CERCLA liability scheme with the traditional purposes of tort liability—compensation, deterrence, and a broader efficiency rationale of placing 'ultimate responsibility for cleanup on those responsible for problems caused by the disposal of chemical poisons.'" Stewart & Campbell, *supra*, at 7 (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)). The House Report on its version of CERCLA described the goals of the bill as

an inventory of inactive hazardous waste sites in a systematic manner, establishment of priorities among the sites based on relative danger, a response program to contain dangerous releases from inactive hazardous

CERCLA is a remedial statute in that Congress enacted it to provide a remedy and to improve upon earlier statutory remedies for hazardous waste disposal and contamination problems.²⁹ As a general principle of statutory construction, courts should liberally construe remedial statutes to effectuate Congress' purpose in enacting them.³⁰ Accordingly, courts

waste sites, acceleration of the elimination of unsafe hazardous waste sites, and a systematic program of funding to identify, evaluate and take responsive actions at inactive hazardous waste sites to assure protection of public health and the environment in a cost-effective manner.

H.R. REP. NO. 96-1016, at 25.

29. See 3 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60.02, at 152-55 (5th ed. 1992) (describing characteristics of remedial statutes). Remedial statutes "provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." *Id.* The category of remedial statutes also includes those statutes "made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, from change of circumstances, from mistake, or any other cause." G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 107, at 142 (1888); see HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 489 (2d ed. 1911) (noting general definition of remedial statute is one "which gives a remedy or means of redress where none existed before, or which creates a right of action in an individual, or a particular class of individuals"); see 3 SINGER, *supra*, § 60.02, at 152 (defining remedial statutes as those "intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state"). Finally, commentators define remedial statutes as those that "relate[] to practice, procedure, or remedies and do[] not affect substantive or vested rights." *Id.* CERCLA is properly characterized as remedial under the first two definitions because Congress enacted it both to provide a remedy for environmental contamination and to improve upon remedies provided by RCRA. See H.R. REP. NO. 96-1016, at 22 (discussing deficiencies of RCRA and stating intent to "establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites").

30. See ENDLICH, *supra* note 29, § 107, at 142 (stating that remedial statutes "are to be construed liberally, to carry out the purpose of the enactment, suppress the mischief and advance the remedy contemplated by the Legislature"); 3 SINGER, *supra* note 29, § 60.01, at 147 ("The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established."). A liberal construction is essentially "'giving the words [of the statute] the largest, the fullest, and most extensive meaning of which they are susceptible.'" ENDLICH, *supra* note 29, § 107, at 147. Because remedial statutes are enacted to cure a deficiency in a previous law, to fill in a blank, to enforce a right or remedy a wrong, "it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely, as the language used, when understood in its most extensive signification, would indicate." *Id.*; see 3 SINGER *supra* note 29, § 60.01, at 147 ("A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction."). Sometimes interpretation of remedial statutes can extend beyond the actual language of the statute. See ENDLICH, *supra* note 29, § 110, at 144 (noting that in some cases, to effectuate purpose, interpretation is extended beyond letter of law). This typically happens when limiting the interpretation to the act's language would impede statutory intent. See *id.* (stating that construction of statute will be extended "to prevent a failure of justice, and consequently of the probable intention"). There are, however, limits placed on courts in interpreting remedial statutes. See *id.* First, as a general rule, "[a] court

interpret CERCLA liberally to effectuate its goals.³¹

CERCLA also provides for strict liability, although there is no such express statement in the statute.³² Instead, the statute provides that courts should construe "liability" as "the standard of liability" under § 1321 of the Clean Water Act,³³ which courts have held to impose strict liability.³⁴ Ac-

cannot go beyond reasonable bounds in applying the liberal construction in order to stay within the prerogatives of the legislature." 3 SINGER, *supra* note 29, § 60.01, at 147. Second, an interpretation cannot be extended beyond the words of a remedial statute "where the words are too explicit to admit of belief that such extension was intended." ENDLICH, *supra* note 29, § 110, at 146.

31. See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992) (noting that CERCLA is construed liberally to achieve goals of statute); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) ("At the outset, we note that a liberal judicial interpretation . . . is required in order that we achieve CERCLA's 'overwhelmingly remedial' statutory scheme."); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (stating that "courts have concluded that a liberal judicial interpretation is consistent with CERCLA's liability scheme"); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986) (finding statutory scheme to be remedial and retroactive); see also *Chandler & Grosser*, *supra* note 3, at 23 ("CERCLA was enacted to remediate the existence of extensive environmental contamination; and to protect and preserve the public health and the environment."); Russo, *supra* note 28, at 157 (noting that because courts consider CERCLA remedial statute, they construe it liberally).

32. See *Shore Realty*, 759 F.2d at 1042 ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise.").

33. 33 U.S.C. §§ 1251-1376 (1994).

34. 42 U.S.C. § 9601(32) (1994); see *Shore Realty*, 759 F.2d at 1042 (noting that courts held liability under Clean Water Act to be strict and Congress understood it to impose such liability). The legislative history of CERCLA indicates that Congress intended it to impose strict liability. See 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (stating that, although many concessions were made in compromise bill, "[w]e have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act"); H.R. REP. NO. 99-253, pt. 3, at 15 ("Liability for the cost of cleanups under CERCLA is 'strict, joint and several.'"). Both the House and the Senate versions of CERCLA originally provided for strict liability. See S. 1480, 96th Cong. § 4(a) (1980); H.R. 7020, 96th Cong. § 3071(a)(1) (1980). House Bill 7020 provided that except for certain enumerated defenses, "where any release, or threatened release, of hazardous waste into the environment from or at an inactive [hazardous waste] site causes any costs described in subsection (b), any person who caused or contributed to the release or threatened release shall be strictly liable for such costs." *Id.* The Senate's version stated that except when a person otherwise liable could prove a defense, those people who own, operate, arrange for disposal at or transport materials to a facility "from which a hazardous substance is discharged, released, or disposed of . . . shall be jointly, severally and strictly liable" for remediation costs. S. 1480, § 4(a). A compromise version of the bill, however, deleted express language of strict liability. See 126 CONG. REC. 31,964 (1980) (statement of Rep. Florio) (recognizing that compromise bill does not expressly state strict liability as standard anymore). One explanation for the deletion was "to avoid confusion over new language." *Id.* at 30,986 (statement of Sen. Stafford). Drafters found using the term "strict liability" would result in confusion with "various common law and statutory doctrines of 'strict,' 'no fault' or product liability." *Id.* (statement of Sen. Simpson). By referring to section 311 of the Clean Water Act, drafters hoped to unambiguously state

cordingly, courts interpret CERCLA as a strict liability statute and hold parties responsible without regard for fault or culpability.³⁵ In addition, when the harm caused is indivisible, CERCLA liability is joint and several.³⁶

the intended liability standard, which was strict liability. *See id.* at 31,964 (statement of Rep. Florio). CERCLA's sponsor in the House of Representatives, Representative Florio, stated:

The liability provisions of this bill do not refer to the terms strict, joint and several liability The standard of liability in these amendments [referring to amendments made to bill by Senate] is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act; that is, strict liability. I have reviewed carefully the statutory language, the floor statements from the Senate, and the language and precedents under section 311 of the Clean Water Act. I have concluded that despite the absence of these specific terms, the strict liability standard already approved by this body is preserved.

Id. at 31,965. The Department of Justice (DOJ) concurred in the understanding that Congress intended CERCLA liability to be strict. *See id.* at 31,966. In a letter to Representative Florio, the DOJ stated liability under the Clean Water Act was "one of strict liability. Both the Senate passed 'Superfund' legislation and section 311 provide for liability subject to certain specifically enumerated defenses. Neither provision allows for a defense based on the defendant's non-negligent conduct or exercise of due care." *Id.* (statement of Rep. Florio).

The proponents of the bill in the Senate also agreed that liability under CERCLA was strict. *See id.* at 30,932 (statement of Sen. Randolph). The bill's sponsor in the Senate, Senator Jennings Randolph, said that the same standard of liability under section 311 was applicable to CERCLA and that he understood "this to be a standard of strict liability As under section 311, due care or the absence of negligence with respect to a release or threatened release of a hazardous substance does not constitute a defense under this act." *Id.* (statement of Sen. Randolph). The strict liability standard of section 311 was widely recognized in the Senate. *See id.* at 30,950 (statement of Sen. Dole) ("It also makes sense to incorporate a definition of strict liability that will serve as a uniform standard in determining liability for cleanup and other costs, and this has been achieved by reference to the Clean Water Act."); *id.* at 30,952 (statement of Sen. Culver) ("[The committee bill] makes those who release hazardous substances strictly liable for cleanup costs, mitigation and third-party damages. Thus, it assures that the costs of chemical poison releases are borne by those responsible for the releases.").

35. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 28 (1st Cir. 1990) (noting that "[u]nder this strict liability statute," plaintiff must only prove that defendant was among potentially liable parties); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted section 107(a) as establishing a strict liability scheme."); *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (holding CERCLA imposes strict liability); *Idylwoods Assocs. v. Mader Capital, Inc.*, 956 F. Supp. 410, 412 (W.D.N.Y. 1997) (recognizing that CERCLA "imposes strict liability for the costs associated with responding to the release or threatened release of the hazardous substance"); *see also Sandvos*, *supra* note 9, at 869 ("Although CERCLA does not state explicitly a scheme of liability, courts consistently have interpreted CERCLA as creating strict, joint, and several liability.").

36. *See United States v. Arrowhead Refining Co.*, No. CIV.A-S-89-202, 1993 WL 170966, at *2 (D. Minn. Mar. 12, 1993) ("The statute imposes joint and several strict liability for harm which is not divisible between multiple actors."). Like strict liability, joint and several liability is not expressly stated in the statute, but courts have interpreted CERCLA to impose such a standard. *See* 126 CONG. REC. 31,965 (statement of Rep. Florio). Earlier versions of the statute included language pro-

To mitigate some of the harshness of CERCLA's strict, joint and several liability scheme, the statute includes defenses, but their availability is limited.³⁷ An otherwise liable party is not liable when the release of hazardous substances was entirely caused by an "act of God," an "act of war" or a third party with no relationship to the defendant if the defendant can prove that it took adequate precautions and used reasonable care to avoid the release.³⁸ Congress also added an "innocent purchaser" defense in

viding for joint and several liability when the harm caused was indivisible. See S. 1480 § 4(a) (stating that except for certain defenses, potentially responsible parties "shall be jointly, severally and strictly liable" for remediation costs); H.R. 7020, § 3071(a)(1)(D) (stating that liability "shall be joint and several with any other person who caused or contributed to such release"). As part of the compromise version, Congress deleted the joint and several liability language "with the intent that the liability of joint tortfeasors be determined under common or previous statutory law." 126 CONG. REC. 31,965 (statement of Rep. Florio). Some interpreted the deletion of the joint and several liability language as requiring a link between culpable conduct and financial responsibility. See *id.* at 30,972 (statement of Sen. Helms) (opining that drafters "have recognized [the] unfairness, and the lack of wisdom in eliminating any meaningful link between culpable conduct and financial responsibility"). Senator Helms found that because courts did not interpret section 311 of the Clean Water Act as imposing joint and several liability, CERCLA would also not include such provisions, limiting the government to suing a defendant "only for those costs and damages that it can prove were caused by the defendant's conduct." *Id.* (statement of Sen. Helms). The DOJ, in a letter to Representative Florio, discussed the Senate's version of CERCLA noting that they deleted the reference to joint and several liability, but that it was clear "that this deletion does not in any way preclude courts from imposing joint and several liability where appropriate. This conclusion is fully supported by both the bill itself and its legislative history." *Id.* at 31,966 (statement of Rep. Florio). Applying common law principles, courts consistently hold that when the environmental harm is indivisible, the parties will be jointly and severally liable. See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("Where the environmental harm is indivisible liability is joint and several."); *Monsanto*, 858 F.2d at 171 ("While CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm."); see also 126 CONG. REC. 31,965 (statement of Rep. Florio) (noting that Coast Guard, which is government body responsible for administering section 311 of Clean Water Act, has interpreted liability to be joint and several in appropriate circumstances); Mark F. Rosenberg, *Parent, Successor, and Alter Ego Liability Concerns in the Transactional Setting*, A.B.A. BRIEF, Summer 1996, at 29, 29 ("Courts have ruled that liability under CERCLA is retroactive and that responsible parties are jointly and severally liable for all cleanup costs at a contaminated site where the harm is indivisible.").

37. See 42 U.S.C. § 9607(b) (1994). Although the statute includes these defenses, courts interpret them very narrowly, limiting their successful use by litigants. See *United States v. Shell Oil Co.*, 841 F. Supp. 962, 970 (C.D. Cal. 1993) ("With CERCLA's basic remedial purposes in mind, the Court narrowly construes the defenses provided under section 107(b)."); see also Brian C. Walsh, *Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers*, 34 HARV. J. ON LEGIS. 191, 195-96 (1997) (noting that use of defenses is limited because of narrow judicial interpretation).

38. See 42 U.S.C. § 9607(b)(1)-(4). Section 9607(b) states:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—(1) an act of

the 1986 amendments to CERCLA.³⁹

God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship [42 U.S.C. § 9601(35) (1994)], existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or (4) any combination of the foregoing paragraphs.

Id. Although CERCLA provides three defenses, defendants rarely rely on the first two. *See* Garrett, *supra* note 13, at 6. Defendants use the act of God defense sparingly because courts interpret it very narrowly. *See* Walsh, *supra* note 37, at 195. An act of God is defined as “an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” 42 U.S.C. § 9601(1) (1994). The United States District Court for the Central District of California refused to find that heavy rainfall fit within this definition in *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987). The court reasoned that “rains [a]re not the type of ‘exceptional’ natural phenomena to which the narrow act of God defense . . . applies,” that they were foreseeable and that they were not the sole cause of release. *Id.* at 1061. Another reason that defendants rarely use the defense is that it is very difficult to prove that an act of God was the sole cause of the release. *See* Walsh, *supra* note 37, at 196.

The act of war defense is also rarely used because, as interpreted by courts, there have been few, if any, instances within the United States that qualify as an act of war. *See id.* Generally, courts interpret an act of war to require “extraordinary government involvement in the operation of the facility,” although there is no statutory or common law definition of the phrase. *Id.* at 196 n.24; *see Shell Oil Co.*, 841 F. Supp. at 970 (noting that no cases define act of war defense).

The third party defense is frequently raised, but also is not very successful. *See* Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1476-77 (1989); *see also Shore Realty*, 759 F.2d at 1048-49 (discussing applicability of third party defense, ultimately rejecting it and holding defendant liable); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 (W.D. Mich. 1989) (rejecting defendant’s assertion of third party defense on grounds that contamination was not caused solely by third party); *Stringfellow*, 661 F. Supp. at 1061 (finding that third party defense did not apply to case because there were multiple causes for release of hazardous substances). To successfully raise the third party defense, a party must prove that: (1) a third party solely caused the release; (2) the third party had no contractual relationship with the defendant; (3) the defendant exercised due care with respect to the hazardous substances; and (4) the defendant took reasonable precautions against foreseeable events. *See* Weber, *supra*, at 1476-77. This defense is not very successful, however, primarily because of courts’ limited interpretation of “solely” caused and their broad interpretation of “contractual relationship.” *See id.*

39. *See* 42 U.S.C. § 9601(35)(A)(i) (1994) (defining “contractual relationship”). This defense is included in the definition of contractual relationship for the purposes of § 9607(b)(3). *See id.* If the defendant acquired the contaminated property after the disposal of hazardous substances, there is no contractual relationship within the meaning of the statute if the defendant can establish “by a preponderance of the evidence: (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous sub-

In order to recover under CERCLA, a party must prove that (1) the defendant falls into one of the categories of "covered persons";⁴⁰ (2) a "release"⁴¹ or a threatened release of a "hazardous substance"⁴² from a

stance which is the subject of the release or threatened release was disposed of on, in, or at the facility." *Id.*; see Weber, *supra* note 38, at 1477 (finding definition of contractual relationship to exclude purchasers who acquired property after contamination with no knowledge of contamination). For a defendant to establish that he or she "did not know and had no reason to know" of the contamination, "the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35)(B); see Weber, *supra* note 38, at 1477 (noting that purchasers have duty to try to minimize liability). In determining whether an appropriate inquiry was made, courts are to consider any specialized knowledge of the defendant, the purchase price of the property, reasonably ascertainable information about the property, the obviousness of contamination and the ease with which the contamination can be discovered upon inspection. See 42 U.S.C. § 9601(35)(B).

40. 42 U.S.C. § 9607(a)(1)-(4). There are four categories of people potentially subject to CERCLA liability:

(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

Id. Although at first glance it appears the phrase "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance" modifies only subparagraph four, courts interpret it to modify subparagraphs one through four inclusive. See *Shore Realty*, 759 F.2d at 1043 n.16. The *Shore Realty* court reasoned, as most courts have, that putting the clause on the same line as subparagraph four was merely a typographical error. See *id.* The court noted:

When the Senate's compromise bill was printed in the Congressional Record at the start of the debate, [it] followed the printing format of the Senate version as reported [earlier]; in each case subparagraph (4) ended with the words "selected by such person," and the commencing clause "from which there is a release" was printed as a new line, supporting the reading [the court] give[s] it above.

Id. Compare 126 CONG. REC. 30,921 (printing "from which there is a release" on separate line from clause four), and *id.* at 30,908 (same) with *id.* at 30,961 (including "from which there is a release" language as though continuation of clause four).

41. 42 U.S.C. § 9601(22) (1994). CERCLA defines "release," *inter alia*, as "any spilling, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" *Id.*

42. *Id.* § 9601(14). CERCLA defines "hazardous substance," *inter alia*, as (A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste hav-

"facility" has occurred;⁴³ (3) the release or threatened release has caused the plaintiff to incur response costs;⁴⁴ and (4) the plaintiff's response costs are necessary and consistent with the "national contingency plan."⁴⁵ CERCLA provides that a current owner and operator of a facility and any "per-

ing the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. § 6921], . . . (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.

Id. The statute defines the term "hazardous substance" through incorporation of substances considered hazardous under other environmental legislation. *See Shore Realty*, 759 F.2d at 1040 n.6. Congress "designed [CERCLA] 'to bring order to the array of partly redundant, partly inadequate federal hazardous substances cleanup and compensation laws.'" *Id.* at 1040 (quoting *ANDERSON ET AL.*, *supra* note 27, at 568). CERCLA accomplishes this by bringing all known hazardous substances together in one definition, as well as authorizing the EPA to designate additional substances that "may present substantial danger to the public health or welfare or the environment." *Id.* (quoting 42 U.S.C. § 9602(a)).

43. 42 U.S.C. § 9601(9). CERCLA defines a "facility" as (A) any building, structure, installation, equipment, pipe or pipeline, . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. Courts broadly interpret this definition. *See United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) ("The term 'facility' should be construed very broadly to include 'virtually any place at which hazardous wastes have been dumped, or otherwise disposed of.'" (quoting *United States v. Ward*, 618 F. Supp. 884, 895 (E.D.N.C. 1985))). Courts have found the definition of facility to include various places where hazardous waste was dumped. *See Ward*, 618 F. Supp. at 895 (finding facility at roadside); *New York v. General Elec. Co.*, 592 F. Supp. 291, 296 (N.D.N.Y. 1984) (finding facility at dragstrip), *superseded by statute as stated in Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1148 (D. Ariz. 1984) (finding facility at real estate subdivision).

44. *See* 42 U.S.C. § 9607(a). The phrase "from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance" is considered "clumsy grammatically, and ambiguous." *Shore Realty*, 759 F.2d at 1044 n.18. The *Shore Realty* court noted that the absence of a comma following the words "threatened release" and the use of the words "which causes" rather than "that causes" raises doubt as to "whether there is liability from a release without the incurrence of 'response costs.'" *Id.* Notwithstanding this ambiguity, response costs are almost always the cause of CERCLA cases, making the issue purely "academic." *See id.*

45. *See* 42 U.S.C. § 9607(a)(1)-(4). The United States Court of Appeals for the Third Circuit has described the requirements for a prima facie case:

[I]n order to establish a prima facie case for recovery . . . a plaintiff must establish that: 1) the defendant falls into one of four categories of "covered persons"; 2) there has been a release or a threatened release of a hazardous substance from a facility; 3) this release or threatened release has caused the plaintiff to incur response costs; and 4) the plaintiff's response costs are necessary and consistent with the National Contingency Plan (NCP).

son" who owned or operated any facility at the time of disposal are subject to liability.⁴⁶ The statute circularly defines "owner or operator" as "any person owning or operating such [a] facility."⁴⁷ Courts interpret this circularity, however, to mean the statutory terms have their ordinary meanings.⁴⁸ In light of the definition of person and the statute's remedial purpose, courts broadly interpret the scope of owner and operator liability, including parent corporations as among those potentially liable.⁴⁹

B. *Limited Liability for Parent Corporations*

In contrast to the broad liability provisions of CERCLA, one of the basic principles of the law of corporations is limited liability.⁵⁰ Limited

Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1219 (3d Cir. 1993) (citations omitted).

46. 42 U.S.C. § 9601(21). A "person" is broadly defined as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body." *Id.*

47. *See id.* § 9601(20)(A)(ii); *see also* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW HAZARDOUS WASTES & SUBSTANCES § 8.12 (1992) ("To the courts' occasional chagrin, CERCLA defines 'operator', in 300 words more or less, as an 'operator.'").

48. *See* RODGERS, *supra* note 47, at 1 n.2 ("The circularity strongly implies, however, that the statutory terms have their ordinary meanings rather than unusual or technical meanings." (quoting *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988))).

49. *See* Russo, *supra* note 28, at 157 (finding broad definition of owner and operator has enabled courts to impose CERCLA liability on wide range of parties); *see also* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1503 (11th Cir. 1996) (holding limited partners can be liable as operators if they "in fact operated the facility at issue"); *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996) (adopting actual control standard for parent corporation operator liability); *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 808 (8th Cir. 1995) (holding United States can be liable as operator under actual control standard); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (imposing operator liability on United States for regulatory activities during World War II); *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993) (holding chief executive officer liable as operator); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993) (finding successor corporation can be liable under CERCLA); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-37 (4th Cir. 1992) (holding corporate principles liable as operators because they had authority to control facility); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992) (holding excavator of contaminated development site liable as operator under "authority to control" standard); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992) (finding tenants could be liable if they had authority to control facility); *Riverside Mkt. Dev. v. International Bldg. Prods.*, 931 F.2d 327, 330 (5th Cir. 1991) (imposing operator liability on majority shareholder when he "actually participate[d] in the wrongful conduct prohibited by the Act").

50. *See* Easterbrook & Fischel, *supra* note 7, at 89 ("Limited liability is a fundamental principle of corporate law."); *see also* Robert A. Kessler, *With Limited Liability for All: Why Not a Partnership Corporation?*, 36 FORDHAM L. REV. 235, 235 (1967-1968) (stating that popularity of corporation as choice of corporate form results from "the corporation [being] universally associated in the popular mind with lim-

liability essentially provides that shareholders of a corporation, whether individual or corporate, are not personally liable for the wrongful conduct of the corporation unless they personally participate in the conduct.⁵¹ Courts regard the corporation as a legal entity that is separated from its shareholders, officers and directors by a corporate veil.⁵² The sharehold-

ited liability"); Oswald & Schipani, *supra* note 5, at 294 ("[O]ne of the basic tenets of corporate law is limited liability.").

51. See REVISED MODEL BUS. CORP. ACT § 6.22(b) (1991) ("Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct."); COOK, *supra* note 6, at 19 ("[Limited liability] is a principle of law . . . that, unless the corporate charter or a constitutional statute provided otherwise, a stockholder, the full par value of whose stock has been paid in, is not liable for and cannot be made to pay any sums in addition thereto."); Chandler & Grosser, *supra* note 3, at 14 (discussing limited liability as protecting stockholders from personal liability, unless they participate in liability creating conduct, either actively or passively). Many regard the protection against unlimited personal liability as "the corporation's most precious characteristic." *Id.* Many believe that limited liability is a significant reason for choosing the corporate form of business. See HAMILTON, *supra* note 3, at 24 (noting common belief that "[i]f all other things are equal, . . . [the limited liability] advantage of the corporate form should usually tip the scales toward incorporating"). In practice, however, limited liability may not serve as significant a function as originally thought. See *id.* First, businesses usually purchase liability insurance for tort claims. See Easterbrook & Fischel, *supra* note 7, at 101. Second, typically employees with access to large amounts of money are bonded. See HAMILTON, *supra* note 3, at 24 (noting bonding occurs whether organization is corporation or partnership). Third, corporations that lack sufficient assets to properly secure a loan often must provide a personal guarantee from their primary shareholder or shareholders, canceling out the benefits of limited liability for that transaction. See *id.* at 24-25 (noting, however, that not all creditors require such guarantees, making limited liability advantageous). Overall, limited liability is a benefit of the corporate form, but its utility is decreased by the use of other risk-spreading measures such as insurance and bonding. See *id.*

52. See HENN, *supra* note 3, § 68, at 75 ("For most purposes, the corporation is treated as an entity."); Oswald & Schipani, *supra* note 5, at 295 (noting that corporation is considered separate from its shareholders); Chandler & Grosser, *supra* note 3, at 14 ("[A] parent corporation is typically regarded as an entity distinct from its subsidiaries."). The notion that corporations enjoy a separate legal existence from their shareholders is "firmly entrenched in American business law." Kessler, *supra* note 50, at 236. Chief Justice Marshall defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). Courts recognize corporations as persons within the meaning of the Fifth and Fourteenth Amendments to the Constitution. See Kessler, *supra* note 50, at 236 (noting that recognition of corporation as person under Constitution "reinforce[s] the separate entity concept"). But see HENN, *supra* note 3, § 68, at 76 (noting that corporations "do not enjoy the protection of the privileges-and-immunities-of-citizens clause"). The corporation is a "legal fiction . . . designed to serve convenience and justice." FLETCHER ET AL., *supra* note 3, § 25, at 512. Treating the corporation as a separate legal entity allows it to enter into contracts, possess and own real and personal property, sue and be sued in its own name and "carry[] on business in much the same manner as a natural person acting through agents of its own selection." *Id.* The benefits of separate corporate existence, however, are dependent upon proper use of the corporate form. See Kessler, *supra* note 50, at 236-37

ers, therefore, are liable for a corporation's obligations only to the extent of their capital contribution.⁵³ Courts will disregard corporate separate-

("The State, granting to individuals the privilege of limiting their individual liabilities for business debts by forming themselves into an entity separate and distinct from the persons who own it, demands in turn that the entity take a prescribed form and conduct itself, procedurally, according to fixed rules.") (quoting *Benintendi v. Kenton Hotel, Inc.*, 60 N.E.2d 829, 831 (N.Y. 1945))). Failure to adhere to corporate formalities will result in courts "piercing the corporate veil," which is a fictitious barrier separating shareholders from the corporation's liability. See Chandler & Grosser, *supra* note 3, at 14.

53. See Aronovsky & Fuller, *supra* note 3, at 431. There are numerous justifications for the doctrine of limited liability. See Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 988 (1986) [hereinafter *Liability of Parent Corporation*] (analyzing economic effects of limited liability for parent corporations in CERCLA context). First, limited liability is said to "foster[] economic growth by encouraging investors to take risks." *Id.* Investors are generally "risk averse," in that when investing, they prefer a smaller guaranteed payoff over a probable, yet larger, payoff. See *id.* at 989. One commentator noted that "[w]ithout a rule limiting liability, the purchaser of one share of a corporation would place her entire wealth at risk: if the corporation suffered a devastating loss, creditors of the corporation could seek recovery from that shareholder for the difference between the corporation's assets and its debts." *Id.* Because of the potential for unlimited personal liability, risk-averse investors would not invest in ventures likely to expose them to such liability. See *id.* By limiting the liability of the investor to the amount of his or her investment, risk-averse investors are more likely to participate in riskier ventures. See *id.*

Second, limited liability is said to be justified because it effectively shifts "a substantial portion of the risk of business failure to creditors and away from shareholders." LEWIS D. SOLOMON ET AL., *CORPORATION LAW AND POLICY* 242 (2d ed. 1988). Commentators have recognized that "limited liability does not eliminate the risk of business failure," and because the loss must be borne by someone, the question becomes by whom. See Easterbrook & Fischel, *supra* note 7, at 98 ("Limited liability is an arrangement under which the loss largely lies where it falls."). If there were unlimited liability, the shareholders of a corporation would bear the entire risk of business failure. See *id.* With limited liability, however, "[e]ach investor has a guaranteed maximum on the loss he will bear." *Id.* Upon dissolution, if a corporation has debt, the shareholder's investment is "wiped out first," in that the shareholder is the first party that will not receive their capital investment back if the corporation's liabilities exceed its assets. *Id.* To the extent that creditors rank above investors in terms of repayment upon dissolution, "risk is 'shifted' from debt investor to equity investor," but, to the extent that there is insufficient equity to pay the corporation's debts and obligations, risk is shifted from the equity investor to the debt investor. *Id.* It is appropriate to shift some of the risk of failure to voluntary creditors because, to a certain extent, they can anticipate these losses and mitigate them by charging increased fees for capital, goods and services. See *Liability of Parent Corporation*, *supra*, at 990. The appropriateness of shifting the risk of failure to involuntary creditors, such as tort victims, however, is debatable as they cannot mitigate their losses in advance. See *id.* ("These creditors do not charge corporations in advance for assuming the risk that insolvency will leave the corporation unable to pay its obligations.")

Third and finally, limited liability is justified by the fact that it reduces the costs of legal disputes. See *id.* at 996 ("If creditors could recover the outstanding debts of the corporation from individual shareholders, the costs of litigation might greatly exceed the gains from internalizing the costs of the corporation's activities."). If shareholders were personally liable for the debts of the corporation, creditors could sue them individually until their claim was satisfied. See *id.* at 996-

ness, however, and pierce the corporate veil in the interests of justice.⁵⁴ Generally, a court will pierce the corporate veil when there is evidence of misuse of the corporate form or evidence that the shareholders formed or used the corporation for an illegal or fraudulent purpose.⁵⁵

Thus, it appears that the purposes of CERCLA and the purposes of limited liability are at odds.⁵⁶ Commentators have recognized that

97 (noting that if they could, creditors would "haul particular shareholders into court and obtain judgments"). This would cause considerable expense both to creditors and the corporation. *See id.* at 997 (noting that shareholders being sued may seek contribution from other shareholders, making "apportioning liability . . . complicated and costly").

54. *See Kim, supra* note 7, at 74 (noting that shareholder treating corporation as alter ego or perpetrating fraud with corporation will cause court to pierce corporate veil). The first justification under which courts will disregard corporate separateness is when a corporation is the alter ego of its owner. *See FLETCHER ET AL., supra* note 3, § 41.10, at 614 (noting that "when the corporation is the mere alter ego, or business conduit of a person, it may be disregarded"). The rationale for alter ego piercing is that "if the shareholders themselves, or the corporations themselves, disregard the legal separation, distinct properties, or proper formalities of the different corporate enterprises, . . . the law will . . . disregard them so far as is necessary to protect individual and corporate creditors." *Id.* The second justification for piercing the corporate veil is when the shareholders established or used the corporation to perpetrate a fraud. *See id.* § 41, at 602-03 (discussing circumstances when court will pierce corporate veil). There is general agreement that "under some circumstances . . . the corporation may be disregarded as an intermediate between the ultimate person or persons or corporation and the adverse party; and should be disregarded in the interest of justice in such cases as fraud, contravention of law or contract, [or] public wrong. . . ." *Id.*

55. *See FLETCHER ET AL., supra* note 3, § 41, at 603 (noting that "corporate veil may be pierced upon a showing of improper conduct or fraudulent or unjust purpose"). The standards for piercing the corporate veil vary from state to state. *See id.* § 41.30, at 661-62 ("No precise formula is available to predict when a court should disregard the corporate entity, each case being *sui generis*"). Generally speaking, however, two requirements must be met. *See id.* at 662. First, "there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist." *Id.* Second, there must be evidence that indicates "adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Id.* The requirements to pierce the corporate veil are applicable whether the corporation is owned by many shareholders, or only one, as in the case of a parent-subsidiary relationship. *See id.* Courts consider certain factors, in varying combinations and degrees, in determining whether to pierce. *See id.* Courts consider inadequate capitalization, the failure to issue stock, the failure to adhere to corporate formalities, such as not holding directors and shareholders meetings, nonpayment of dividends, commingling of corporate funds and overlap of officers and directors. *See id.* at 663. In addition, using some combination of these factors, most jurisdictions require evidence that adhering to corporate separateness would result in an unjust result or a fundamental unfairness. *See id.* at 664. Courts, however, are very reluctant to pierce the corporate veil—piercing the corporate veil is the exception rather than the rule. *See id.* § 41.10, at 614-15 ("The standards for the application of alter ego principles are high, and the imposition of liability notwithstanding the corporate shield is to be exercised reluctantly and cautiously.").

56. *See Aronovsky & Fuller, supra* note 3, at 423 (noting that holding parent corporations liable comports with CERCLA's broad liability goals, but "[o]n its face, . . . violates a fundamental principle of the law of corporations—that share-

"[w]hen considering the liability of parent corporations for the environmental torts of their subsidiaries, the issue is often whether the applicable standard of liability derives from direct application of the statutory definitions of CERCLA or from common law principles of corporate law."⁵⁷ Circuit courts are split on this issue and the Supreme Court has yet to decide whether parent corporations should be held directly or indirectly liable under CERCLA.⁵⁸ Courts have adopted three different liability tests to determine a parent corporation's liability.⁵⁹ First, many circuits hold parent corporations directly liable if they had "actual control" over their subsidiaries' affairs.⁶⁰ Second, some circuit courts have adopted an "authority to control" standard for imposing direct liability on a parent corporation.⁶¹ Third, a minority of circuits, including the Sixth Circuit in *Cordova Chemical*, hold that a parent corporation can be liable only when there is evidence to warrant piercing the corporate veil.⁶²

holders . . . are liable for no more than the amount of their investment in the corporation").

57. Chandler & Grosser, *supra* note 3, at 14.

58. See *id.* at 24-25 (noting that Supreme Court has previously denied certiorari to decide what is appropriate liability standard). There is a wide disparity in the circuit courts on the issue of what liability standard to apply to parent corporations, which many believe that the Supreme Court should remedy. See *id.* at 25. Two commentators noted the confusion among the circuit courts:

[I]t should not be acceptable for federal courts to be operating under different interpretations of CERCLA, a federal statute enacted to create uniform environmental control and regulation. Courts have used three approaches to address corporate owner liability under CERCLA § 107. Some courts have analyzed corporate owner liability indirectly as owners. Other courts have analyzed corporate owner liability directly as operators. Finally, still another court has analyzed corporate owner liability indirectly as an operator. The use of three different approaches to analyze the same issue, and the resulting unsettled case law illustrates the confusion and inadequacy of the direct/indirect liability in its present state.

Id. at 24-25.

59. Compare *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996) (adopting actual control standard for parent corporation liability), with *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992) (adopting authority to control standard in holding corporate principles liable as operators), and *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) (refusing to hold parent corporation liable as operator unless corporate veil could be pierced).

60. For a discussion of the actual control standard for holding parent corporations directly liable as operators, see *infra* notes 63-97 and accompanying text.

61. For a discussion of the authority to control standard for holding parent corporations directly liable as operators, see *infra* notes 98-102 and accompanying text.

62. For a discussion of the piercing the corporate veil indirect liability standard for parent corporations, see *infra* notes 103-09 and accompanying text. For a discussion of *Cordova Chemical*, see *infra* notes 110-60 and accompanying text.

C. *Direct Liability*1. *Actual Control Standard*

In dealing with the issue of operator liability for parent corporations, many courts hold that a parent corporation can be directly liable if the parent exercised actual control over the actions of its subsidiary.⁶³ The United States District Court for the Northern District of Illinois, in *Rockwell International Corp. v. IU International Corp.*,⁶⁴ was one of the first courts to adopt the actual control standard for parent corporation operator liability.⁶⁵ Based on CERCLA's definition of "owner or operator," the court concluded that "only those who actually operate or exercise control over the facility that creates an environmental risk can be held liable under CERCLA."⁶⁶

The United States Court of Appeals for the First Circuit, in *United States v. Kayser-Roth Corp.*⁶⁷ also adopted an actual control liability standard, holding a parent corporation directly liable as an operator under CERCLA.⁶⁸ In *Kayser-Roth*, the Environmental Protection Agency (EPA)

63. See *Schiavone*, 79 F.3d at 254 (recognizing that direct parent operator liability through actual control standard is compatible with CERCLA); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (holding that courts should use actual control standard to adjudge parent operator liability); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (stating that actual and pervasive control is needed for liability); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993) (affirming imposition of liability on parent corporation under actual control standard); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (adopting liability standard whereby parent will be responsible when it exercises "active involvement in the activities of the subsidiary"); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390 (N.D. Ill. 1988) (holding parent liable because it exercised sufficient control over facility).

64. 702 F. Supp. 1384 (N.D. Ill. 1988).

65. *Id.* at 1390 (determining liability based on whether parent actually operated or exercised control over facility).

66. *Id.* (quoting *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 657 (N.D. Ill. 1988)). Specifically, the court found it significant that owner or operator did not include those with only a security interest in the facility. See *id.* (examining definition that excludes from liability those who "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility"). Because not participating in the management of the facility was a prerequisite to avoiding liability, the court concluded that participation in the management must be a basis for liability. See *id.* The court refined its liability standard by stating that the "[m]ere ability to exercise control as a result of the financial relationship of the parties is insufficient for liability to attach. The entity must actually exercise control." *Id.*

67. 910 F.2d 24 (1st Cir. 1990).

68. See *id.* at 27 ("[W]e believe that a fair reading of CERCLA allows a parent corporation to be held liable as an operator of a subsidiary corporation."). The *Kayser-Roth* court adopted what came to be known as the actual control standard for operator liability. See *id.* In *Kayser-Roth*, the government brought suit against the parent corporation of an owner of a contaminated site for the cleanup costs that the EPA incurred at that site. See *id.* at 25. The district court found that the

sought to recover cleanup costs from the parent of a dissolved subsidiary by alleging that it was both an owner and an operator of the site.⁶⁹ The court began by examining CERCLA's language and found that the statute created two categories of potentially liable parties, owners and operators, with two different standards of liability.⁷⁰ The court then determined that CERCLA's legislative history provided no indication that Congress intended to exclude parent corporations from "all persons" who are "operators."⁷¹ Thus, the *Kayser-Roth* court concluded that "the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA."⁷²

parent corporation "exerted practical total influence and control over [its subsidiary's] operations," and accordingly held the parent liable as an operator. *Id.* at 27. On appeal, after concluding that parent corporations could be directly liable, the First Circuit established a standard for holding a parent liable as an operator by stating:

Without deciding the exact standard necessary for a parent to be an operator, we note that it is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary.

Id.

69. *See id.* at 25. Kayser-Roth Corp. was the parent corporation of Stamina Mills, Inc., a textile manufacturer that used trichloroethylene ("TCE"), a hazardous substance, in its manufacturing operations. *See United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 17 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990). There is evidence that Stamina Mills improperly dumped TCE on its property, into landfills and a into nearby river. *See id.* In 1979, surveys of the drinking water supplies in the surrounding areas showed elevated levels of TCE, of which the EPA deemed Stamina Mills the cause. *See id.* As a result, the EPA added the site to the National Priorities List in 1982 and remediation began soon thereafter. *See id.* Stamina Mills dissolved, so the EPA sued Kayser-Roth for contribution. *See Kayser-Roth*, 910 F.2d at 25.

70. *See Kayser-Roth*, 910 F.2d at 26. The court first examined CERCLA's liability provisions and definitions, finding operator to be defined circularly as any person operating a facility. *See id.* (citing 42 U.S.C. § 9601(20)(A)(ii) (1994)). The court then looked at the phrase "owner or operator" and determined that "Congress, by including a liability category in addition to owner ('operators') connected by the conjunction 'or,' implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership." *Id.* Finally, the court noted that CERCLA defined "person" broadly. *See id.* at 26 n.5 ("The statute defines 'person' extremely broadly and certainly includes a parent corporation." (citing 42 U.S.C. § 9601(21))). On the basis of these factors, the court concluded that according to CERCLA's language, "corporate status, while relevant to determine ownership, cannot shield a person from operator liability." *Id.* at 26.

71. *See id.* The court relied on *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985), which in reviewing Congress' intent in enacting CERCLA, determined that the final version of the statute "imposed liability on classes of persons without reference to whether they caused or contributed to the release or threat of release." *Kayser-Roth*, 910 F.2d at 26. Therefore, the First Circuit concluded, parents could be potentially responsible parties under CERCLA. *See id.*

72. *Kayser-Roth*, 910 F.2d at 26. The court continued by noting that other courts that have considered the issue support its interpretation of operator liability. *See id.* at 26-27 (citing *United States v. Northeastern Pharm. & Chem. Co.*, 810

The United States Court of Appeals for the First Circuit affirmed its adoption of the actual control test in *John S. Boyd Co. v. Boston Gas Co.*⁷³ In that case, the court relied on *Kayser-Roth* and reaffirmed its finding that the statutory language and congressional intent support a direct liability standard.⁷⁴ Accordingly, the court held a parent corporation liable for the cleanup of oil gas waste produced at the subsidiary's gas and electric company.⁷⁵

The United States Court of Appeals for the Second Circuit also adopted the actual control standard in *Schiavone v. Pearce*,⁷⁶ finding it to be consistent with both CERCLA's broad remedial scheme and the statutory language.⁷⁷ In *Schiavone*, the current owner of a contaminated site

F.2d 726, 743-44 (8th Cir. 1986) (discussing operator liability under CERCLA); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 671-72 (D. Idaho 1986) (adopting direct operator liability standard for parents and finding that it is supported by intent of Congress)). The *Kayser-Roth* court also considered and distinguished the indirect operator liability standard, as adopted in *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990). See *Kayser-Roth*, 910 F.2d at 27 ("We are unpersuaded by [*Joslyn Manufacturing*,] upon which Kayser relies most heavily to support its position."). The *Kayser-Roth* court found the *Joslyn Manufacturing* court was concerned with owner rather than operator liability and framed the issue before it as "whether to 'impose direct liability on parent corporations for the violations of their wholly owned subsidiaries.'" *Id.* (quoting *Joslyn Manufacturing*, 893 F.2d at 81). At issue in *Kayser-Roth*, however, was whether the parent could be liable as an operator because of its own activities, not for the activities of its subsidiary. See *id.* (noting that narrow interpretation later given by United States Court of Appeals for the Fifth Circuit supported court's reading of *Joslyn Manufacturing*; see also *Riverside Mkt. Dev. Corp. v. International Bldg. Prods.*, 931 F.2d 327, 330 (5th Cir. 1991) (refusing to follow *Joslyn Manufacturing*) and adopting direct liability standard instead).

73. 992 F.2d 401 (1st Cir. 1993).

74. See *id.* at 408. The court first examined the liability provisions of CERCLA, recognizing that other courts included parent corporations as operators. See *id.* at 404-05 ("Courts have interpreted [CERCLA] to include . . . parent corporations when the parent can be considered an operator." (citing *Kayser-Roth*, 910 F.2d at 26)). The court then examined Congress' purpose in enacting CERCLA, namely to make responsible parties pay for cleanups. See *id.* at 405 (stating that "essential purpose" of CERCLA is "making 'those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'" (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986))). Relying on these findings and the *Kayser-Roth* court's imposition of liability on a parent corporation without piercing the corporate veil, the court applied the *Kayser-Roth* liability standard to the instant case. See *id.* at 408 (noting that imposition of liability requires, at minimum, "active involvement in the activities of the subsidiary" (citing *Kayser-Roth*, 910 F.2d at 27)).

75. See *id.* (discussing evidence of parent's control over subsidiary, ultimately concluding that there was sufficient evidence of "active involvement" in subsidiary's activities, and therefore district court was not in clear error by imposing liability).

76. 79 F.3d 248 (2d Cir. 1996).

77. *Id.* at 255 ("A recognition of direct operator liability for parent corporations is both compatible with the statutory language and consistent with CERCLA's broad remedial scheme."). In considering whether a parent corporation could be

sued the parent corporation of the previous operator for cleanup costs that the current owner incurred at its subsidiary's creosoting plant.⁷⁸ The Second Circuit began its determination of the appropriate operator liability standard by examining the legislative history of CERCLA and found that "Congress enacted CERCLA with the expansive, remedial purpose of ensuring 'that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions.'"⁷⁹ The court determined that, because of the remedial nature of the statute, it should liberally construe CERCLA to effectuate these congressional concerns.⁸⁰ The court's interpretation led to its conclusion that "[a]n interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and

held directly liable for the actions of its subsidiary, the court recognized that there were courts that were unwilling to extend CERCLA liability beyond the "established bounds of corporate common law," instead adhering to traditional veil-piercing standards. *Id.* (citing *United States v. Cordova Chem. Co.*, 59 F.3d 584, 590-91 (6th Cir.), *vacated*, 67 F.3d 586 (6th Cir. 1995); *Joslyn Manufacturing*, 893 F.2d at 82-83). The United States Court of Appeals for the Second Circuit, however, "not unmindful of the weighty concerns" that courts expressed when adopting indirect liability, chose to subscribe to the views of the United States Courts of Appeals for the First, Third, Fourth, Seventh, Eighth and Eleventh Circuits. *Id.*; *see Idylwoods Assocs. v. Mader Capital, Inc.*, 956 F. Supp. 410, 413 (W.D.N.Y. 1997) (relying on *Schiavone* because it subscribed to views adopted by six different circuits in applying actual control standard).

78. *See Schiavone*, 79 F.3d at 250 (reversing grant of summary judgment for parent corporation for operator liability). American Creosoting Corp., the wholly owned subsidiary of Union Camp, improperly disposed of, stored and handled creosote, which it manufactured. *See id.* The property on which the plant was located changed ownership a number of times in the 1960s and 1970s, and in 1984, the then owner, Pearce, implemented a plan to remediate the contamination at the request of the EPA. *See id.* Plaintiff Schiavone purchased the property, and because of inadequate cleanup efforts by Pearce, incurred substantial remediation costs. *See id.* Schiavone sued Kerr-McGee Corp., who purchased American Creosoting Corp. from Union Camp in 1964, and Kerr-McGee impleaded Union Camp for its activities during the time that it was still a parent corporation. *See id.* at 251.

79. *Id.* at 253 (quoting S. REP. NO. 96-848, at 13 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119). Accordingly, the court found that a primary goal of CERCLA was to "extend liability to all those involved in creating harmful environmental conditions." *Id.*

80. *See id.* at 253. The Second Circuit's interpretation comports with remedial statutory construction principles, as well as the interpretation offered by the vast majority of courts faced with CERCLA issues. *See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (noting that expansion of liability to parent corporation is consistent with CERCLA's "broad remedial purposes"); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992) (noting that courts construe CERCLA liberally to achieve goals of statute); *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 285 (2d Cir. 1992) (noting Congress intended that CERCLA be construed liberally); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("Because it is a remedial statute, CERCLA must be construed liberally to effectuate its . . . goals . . .").

purpose of the legislation.”⁸¹

After concluding that the legislative intent of CERCLA supported direct parent liability, the Second Circuit then considered whether there was support in the statute itself for imposing direct liability.⁸² The court found two instances in which the statutory language of CERCLA supported direct parent corporation liability.⁸³ First, the statute imposes liability on both owners and operators indicating that CERCLA liability is disjunctive; “‘owner’ liability and ‘operator’ liability denote two separate concepts.”⁸⁴ The court found that in the parent-subsidiary context, this distinction is particularly relevant because there are different standards of liability for owners and operators.⁸⁵ For a parent corporation to be liable as an owner for the actions of its subsidiary, courts must pierce the corporate veil.⁸⁶ In contrast, courts can directly impose operator liability when a parent corporation, “due to the specifics of its relationship with its affiliated corporation [is deemed] to have had substantial control over the fa-

81. *Schiavone*, 79 F.3d at 253; *accord* *United States v. Kayser-Roth*, 910 F.2d 24, 26 (1st Cir. 1990) (noting that its analysis of legislative purpose of CERCLA “reveals no reason why a parent corporation cannot be held liable as an operator”). The *Schiavone* court recognized that imposing liability on parent corporations is inconsistent with limited liability principles, but it nonetheless comports with CERCLA’s goals. *See Schiavone*, 79 F.3d at 253-54.

82. *See Schiavone*, 79 F.3d at 254 (“Courts imposing operator liability directly on a parent corporation have drawn support not only from legislative intent, but also from related statutory language.”).

83. *See id.*

84. *Id.* The court found Congress’ inclusion of both terms to be the “most compelling argument” for imposing direct parent liability. *Id.* Numerous courts have recognized the disjunctive nature of section 107(a)(2) of CERCLA. *See Long Beach Unified Sch. Dist. v. Dorothy B. Goodwin Cal. Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994) (“Obviously ‘owner’ and ‘operator’ are distinct concepts, else Congress wouldn’t have used two words.”); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (noting that owner and operator liability are different); *Lansford-Coaldale*, 4 F.3d at 1220 (“There is general agreement that under CERCLA, ‘owner’ liability and ‘operator’ liability denote two separate concepts”); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993) (noting that operator liability is separate from owner liability); *Kayser-Roth*, 910 F.2d at 26 (“Congress, by including a liability category in addition to owner (‘operators’) connected by the conjunction ‘or,’ implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership.”).

85. *See Schiavone*, 79 F.3d at 254 (“This distinction has particular relevance in the context of parent and subsidiary corporations where the theory of liability selected mandates different bases of proof.”).

86. *See id.* (“A finding of owner liability invokes the parent-subsidiary relationship and can be made only in circumstances that permit corporate veil piercing.”). If the subsidiary is the record owner of the facility, a parent can only be liable as an owner by disregarding the companies’ separate existence and treating them as the same company, as is done through piercing the corporate veil. *See United States v. USX Corp.*, 68 F.3d 811, 823 (3d Cir. 1995) (“[T]raditional principles of corporate law would not permit ‘owner’ liability to be extended to a corporate parent unless piercing the corporate veil were warranted.”).

cility in question."⁸⁷

Second, the court relied on the statutory definition of "person" as support for holding a parent corporation directly liable as an operator.⁸⁸ Recognizing that the statute broadly defined "person" to include "a firm, corporation, or commercial entity, among other things," the court found that the language indicates an intent to include parent corporations among those potentially liable.⁸⁹ Therefore, based on the legislative intent of Congress and the plain language of CERCLA, the Second Circuit concluded that the parent corporation's liability should be analyzed under the actual control standard.⁹⁰

The United States Court of Appeals for the Third Circuit reached a similar conclusion in *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*⁹¹ Here, Lansford-Coaldale brought suit against the parent corporation of a bankrupt lead smelter for contamination of the surrounding ground water.⁹² In determining the appropriate liability standard, the court first noted that "[t]here is general agreement that under CERCLA, 'owner' liability and 'operator' liability denote two separate concepts and hence require two separate standards for determining whether they apply."⁹³

87. *Schiavone*, 79 F.3d at 254.

88. *See id.* at 255 ("An additional justification raised by courts in support of this characterization of operator liability looks to the statute's definition of 'person.'").

89. *Id.* The court found that the language of the statute indicates intent to hold a parent corporation liable, "if it is otherwise determined to have operated the facility in question." *Id.*

90. *See id.* (adopting direct liability standard because it was "both compatible with the statutory language and consistent with CERCLA's broad remedial scheme"). Because there were genuine issues of material fact as to whether the parent exercised actual control, the court remanded the case for a liability determination under the newly adopted actual control standard. *See id.*

91. 4 F.3d 1209 (3d Cir. 1993). The Third Circuit also adopted the actual control standard for determining parent corporation operator liability. *See id.* at 1221. The court relied on substantially similar grounds in adopting this standard as the First and Second Circuits, particularly the disjunctive language imposing liability on owners *and* operators, as well as the broad definition of person. *See id.* at 1220-21.

92. *See id.* at 1213 (deciding on appeal whether district court appropriately found parent corporation not liable). Tonolli Canada, a company engaged in the business of lead smelting, incorporated a wholly owned subsidiary in Carbon County, Pennsylvania, that participated in the same business. *See id.* In the early 1980s, Tonolli applied for a permit to dispose of hazardous waste at their site, to which Lansford-Coaldale responded by commissioning a study on the probable contamination that would result. *See id.* The study showed a threatened release of hazardous waste into the authority's water supply. *See id.* Consequently, Lansford-Coaldale filed suit against Tonolli Pennsylvania, Tonolli Canada and Tonolli Canada's parent corporation, IFIM, but later amended the complaint, dropping their suit against the bankrupt Tonolli Pennsylvania. *See id.*

93. *Id.* at 1220. The court relied on the fact that numerous federal courts and commentators have already considered the issue, finding that there are two classes of liable parties under the statute. *See id.* (citing *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990) (deciding standard for parent corporation

Next, the court looked at Congress' legislative intent in enacting CERCLA.⁹⁴ The Third Circuit determined that it was clear "that Congress has expanded the circumstances under which a corporation may be held liable for the acts of an affiliated corporation such that, when a corporation is determined to be the operator of a subsidiary . . . traditional rules of limited liability for corporations do not apply."⁹⁵ Finally, the Third Circuit found that CERCLA's language supports parent corporation liability, "notwithstanding the traditional rule of limited liability in the corporate context."⁹⁶ The court concluded, accordingly, that the actual control standard was an appropriate balance between CERCLA's remedial purpose and the benefits of limited corporate liability.⁹⁷

operator liability); *United States v. Mottolo*, 695 F. Supp. 615 (D.N.H. 1988) (addressing "owned or operated" liability issue), *superseded by statute as stated in Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439 (W.D. Mich. 1989); *Oswald & Schipani*, *supra* note 5, at 268 (discussing liability provisions for owners and operators under CERCLA); *Liability of Parent*, *supra* note 53, at 987 (considering owner and operator liability provisions in CERCLA in parent corporation context)).

94. See *Lansford-Coaldale*, 4 F.3d at 1221 (recognizing that Congress' intent was difficult to discern with precision in CERCLA because of its lack of clarity and poor draftsmanship). Many courts and commentators also express this view. See, e.g., *Sandvos*, *supra* note 9, at 863 ("The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is a mess."). Nevertheless, the Third Circuit concluded that the scope of CERCLA liability included parent corporations. See *Lansford-Coaldale*, 4 F.3d at 1221 (noting that despite lack of complete clarity in legislative history, it incidentally addressed parent liability issues).

95. *Lansford-Coaldale*, 4 F.3d at 1221. Like the First and Second Circuits, this court also found support for its decision in the fact that CERCLA is a remedial statute, which courts should construe broadly. See *id.* (finding broad construction necessary to accomplish CERCLA's "'essential purpose' of making 'those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created'" (quoting *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993))).

96. *Id.* at 1221 n.11. The court found that CERCLA makes an operator a potentially liable party and that although "'operator' is defined circularly as any person operating a facility, 'person' is defined broadly to include a firm, corporation, or commercial entity, among other things." *Id.* (citations omitted). Therefore, CERCLA's intent is to "hold a corporation liable for the environmental violations of its subsidiaries and sister corporations, if it is otherwise deemed to have operated the facility in question." *Id.*

97. See *id.* at 1221 ("[W]e thus adopt the actual control standard, which appears to strike the appropriate middle ground, balancing the benefits of limited liability with CERCLA's remedial purposes."). After concluding direct liability was the appropriate standard, the Third Circuit recognized there were "two competing standards for the imposition of [direct] operator liability": the actual control test and the authority to control test. *Id.* The court compared these tests and ultimately adopted the former. See *id.* The actual control standard holds a corporation liable "when there is evidence of substantial control exercised by one corporation over the activities of the other." *Id.* (citing *Kayser-Roth*, 910 F.2d at 27). The court continued by stating that although corporate limited liability was the general rule, under the actual control standard, when a corporation "played an active role in the management of a corporation responsible for environmental wrongdoing," it cannot escape liability by hiding behind the corporate form. *Id.* To be an operator under the actual control test, the parent corporation must exercise more control over its subsidiary than "the concomitant general authority or

2. *Capacity to Control Standard*

The alternative direct liability test, followed by two circuits, is the capacity to control standard.⁹⁸ Under this test, a court will hold a parent corporation liable for the waste disposal actions of its subsidiary if the parent possessed the authority to control those actions.⁹⁹ In *United States v. Carolina Transformer Co.*,¹⁰⁰ the United States Court of Appeals for the Fourth Circuit adhered to the capacity to control standard for assessing operator liability on a corporate officer and stockholder.¹⁰¹ The court

ability to control that comes with ownership." *Id.* at 1222. Instead, a parent corporation must exercise "'actual participation and control' over the other corporation's decisionmaking." *Id.* This was the test advanced by the First Circuit in *Kayser-Roth*. *Kayser-Roth*, 910 F.2d at 27. The court contrasted the actual control test with the authority to control test, under which a parent corporation can be liable as an operator "as long as one corporation had the capability to control, even if it was never utilized." *Lansford-Coaldale*, 4 F.3d at 1221. The Third Circuit found that the authority to control standard was too broad and "may unduly penalize the corporation for a decision by that corporation to benefit from one of the well-recognized and salutary purposes of the corporate form: specialization of management." *Id.* For a further discussion of the authority to control standard, see *infra* notes 98-102, and accompanying text.

98. See *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836-37 (4th Cir. 1992) (holding that district court correctly applied authority to control standard for determining officer and shareholder liability); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir. 1992) (holding that there is "well-settled rule that 'operator' liability . . . only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment"). Whether the United States Court of Appeals for the Ninth Circuit's decision in *Kaiser Aluminum* is applicable to parent corporations is questionable. See *id.* at 1342. In that case, the court held specifically that an excavator of a facility was liable as an operator because he possessed the authority to control the site development. See *id.* ("We conclude . . . allegations of [the excavator's] operations on the property tend to show that [the excavator] had sufficient control over this phase of the development to be an 'operator' under section 9607(a)(2) [of CERCLA].").

99. See Rosenberg, *supra* note 36, at 30 ("[A]n entity is an 'operator' if it simply has the authority to control waste disposal and other matters relating to the management of the business at the site."). The authority to control standard is significantly more broad than the actual control standard. See Stewart & Campbell, *supra* note 28, at 9 ("The broadest theory attaches parent liability as an 'operator' on the basis of the parent's 'capacity to control' the subsidiary, a standard that disregards the corporate separateness of the parent altogether."). One commentator explained one problem with the authority to control test:

Every parent corporation, by virtue of the power it wields over its subsidiary, could control that subsidiary's activities, including those activities relating to its environmental matters and the operation of a facility. A literal application of the capacity to control test would thus lead to a finding of parent liability in every case involving a CERCLA violation by a subsidiary.

Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis Under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U. L.Q. 223, 260 (1994).

100. 978 F.2d 832 (4th Cir. 1992).

101. *Id.* at 837 (affirming adoption of standard imposing liability "so long as the authority to control the facility was present" (citing *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992))). Only months before the

reasoned that this standard was appropriate based on CERCLA's definition of operator as well as on the principle that "a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup" should be liable.¹⁰²

D. Indirect Liability Standard—Piercing the Corporate Veil

Two courts, including the Sixth Circuit in *Cordova Chemical*, have adopted an indirect liability standard, holding that courts may impose operator liability on a parent corporation only when the requirements to pierce the corporate veil are met.¹⁰³ The Fifth Circuit, in *Joslyn Manufacturing Co. v. T.L. James & Co.*,¹⁰⁴ was the first court to hold that a parent corporation could only be indirectly liable as an operator.¹⁰⁵ In *Joslyn*

Carolina Transformer decision, the Fourth Circuit first adopted the authority to control test in *Nurad*. *Nurad*, 966 F.2d at 842. In *Nurad*, the owner of contaminated property sued the previous tenants of the property to recover the costs incurred in removing several underground storage tanks. *Id.* at 840. The court found that the tenant defendants "need not have exercised actual control in order to qualify as operators under [section] 9607(a)(2), so long as the authority to control the facility was present." *Id.* at 842. Although *Nurad* did not deal with issues of corporate liability, and therefore the interaction between limited liability principles and the authority to control standard, the *Carolina Transformer* court adopted *Nurad's* reasoning in whole. See *Carolina Transformer*, 978 F.2d at 836-37 (noting that because courts impose section 9607(a)(2) liability on one who owned or operated facility at time of disposal, "*Nurad's* holding as to the liability of a person who owned a facility at a time when hazardous waste was spilling or leaking, applies with equal force to a person who operated a facility at such a time").

102. *Carolina Transformer*, 978 F.2d at 836-37 (quoting *Nurad*, 966 F.2d at 842). In *Carolina Transformer*, two of the defendants were the sole stockholder and a director of the defendant company. See *id.* at 837. Both testified in deposition that they were responsible for the company's property and operations. See *id.* Applying the authority to control standard, the court concluded that the district court did not err in holding there was sufficient evidence to find defendants liable as operators, "for each of them had a right to control [the company's] operations." *Id.*

Although *Carolina Transformer* does not deal with the issue of parent corporation operator liability, its holding is nevertheless applicable to that situation because traditional corporate law principles treat parent corporations and shareholders similarly. See FLETCHER ET AL., *supra* note 3, § 25, at 514 (noting that corporation is entity distinct from shareholders, whether individual or corporate). The *Carolina Transformer* court, and other courts that adhere to the authority to control standard, adopted this broad standard in the face of traditional limited liability principles, indicating that this standard "disregards the corporate separateness of the parent altogether." Stewart & Campbell, *supra* note 28, at 9.

103. See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir.) (en banc) (holding that parent corporation will be liable only when there is sufficient evidence to warrant piercing corporate veil), *cert. granted*, 118 S. Ct. 621 (1997); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990) (holding that CERCLA does not authorize disregarding corporate law principles).

104. 893 F.2d 80 (5th Cir. 1990).

105. *Id.* at 82-83. The appellant argued that the Fifth Circuit should follow several other courts and liberally construe the definition of owner or operator to include parent corporations, but the court declined to do so. See *id.* at 82 (deciding not to follow "the several courts, including the Second Circuit, which have

Manufacturing, the former owner of a facility sought contribution for cleanup costs from the parent corporation of a former operator.¹⁰⁶ The court looked first to the language of CERCLA, and found that it “[s]ignificantly . . . [did] not define ‘owners’ or ‘operators’ as including the parent company of offending wholly-owned subsidiaries.”¹⁰⁷ Likewise, the court could not find sufficient support in CERCLA’s legislative history to warrant disregarding the principles of limited liability.¹⁰⁸ Thus, the court concluded that “[w]ithout an express Congressional directive to the contrary, common-law principles of corporation law, such as limited liability, govern [the] court’s analysis” and the appropriate liability standard is piercing the corporate veil.¹⁰⁹ In the context of the conflicting interpretations of CERCLA operator liability for parent corporations described above, the Sixth Circuit decided *Cordova Chemical*.

III. *UNITED STATES V. CORDOVA CHEMICAL CO.*

A. *Case Background*

In *Cordova Chemical*, the Sixth Circuit addressed the issue of what standard courts should apply when adjudging whether a parent corporation is

extended CERCLA liability to parents”). The Fifth Circuit’s refusal to adopt the liberal construction of the CERCLA language earned the decision the characterization as “[s]omething of an anomaly.” John S. G. Worden, *CERCLA Liability of Parent Corporations for the Acts of Their Subsidiaries*, 30 IDAHO L. REV. 73, 79 (1993-1994).

106. See *Joslyn Manufacturing*, 893 F.2d at 81-82 (noting that former owner appealed district court’s grant of summary judgment for parent corporation). *Joslyn Manufacturing* arose from the contamination of a former creosoting plant built and operated by Lincoln Creosoting Co., a subsidiary of T.L. James & Co. *Id.* at 81. In 1950, Joslyn Manufacturing Co. purchased Lincoln and operated the plant until 1969, when one of the numerous owners that the property had after 1969 purchased it. See *id.* at 82. Joslyn was ordered to clean up the facility and, therefore, brought suit against T.L. James & Co. and the other owners of the property for contribution. See *id.* at 80-82.

107. *Id.* at 82.

108. See *id.* The court found it “‘elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms.’” *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The court continued by stating that “[t]he ‘normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific,’” and “[a]ny bold rewriting of corporation law in this area is best left to Congress.” *Id.* at 82-83 (quoting *Midlantic Nat’l Bank v. New Jersey*, 474 U.S. 494, 501 (1986)). The court rejected the appellant’s argument that CERCLA represents an “‘inherent’ underlying intent of Congress to hold those who profited from hazardous waste sites responsible for the cost of cleanup and a desire to effectuate a timely cleanup of these sites.” *Id.* at 83. According to the Fifth Circuit, “[s]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.” *Id.* (quoting *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979)).

109. *Id.* The court remarked that “[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.” *Id.*

liable as an operator under CERCLA.¹¹⁰ In deciding the case, the court adopted a piercing the corporate veil test.¹¹¹ Thus, courts can only hold parent corporations indirectly liable for the environmental wrongs of their subsidiaries.¹¹²

Cordova Chemical arose out of the contamination of a chemical manufacturing plant in Dalton Township, Michigan, which began in 1957.¹¹³ Chemical manufacturing operations contaminated the ground water flowing underneath the site, as well as the surrounding soil and surface water.¹¹⁴ The site's initial owner, Ott Chemical Company ("Ott I"), initially contaminated the property by manufacturing and disposing of chem-

110. See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 575 (6th Cir.) (en banc) ("A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred on a site owned by a subsidiary."), *cert. granted*, 118 S. Ct. 621 (1997). The Sixth Circuit noted that "[t]his appeal highlights the difficulty that often attends the apportionment of liability for the cleanup costs of sites that have been subjected to long-term environmental degradation." *Id.*

111. See *id.* at 580 (holding that liability standard for parent corporations is "whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary").

112. See *id.* (rejecting district court's direct liability standard as basis for fixing operator liability). The Sixth Circuit held "that where a parent corporation is sought to be held liable as an operator . . . based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met." *Id.*

113. See *id.* at 575. The Sixth Circuit noted that the "environmental damage occurred over a period of decades and during the watch of several owners" making the apportionment of liability especially difficult. *Id.*

114. See *id.* From approximately 1959 until 1986, a number of owners used the site for chemical manufacturing to produce a variety of synthetic organic intermediate chemicals that are used for pharmaceutical, veterinary and agricultural purposes. See *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 555 (W.D. Mich. 1991). *aff'd in part, rev'd in part sub nom.*, *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir.) (en banc), *and cert. granted*, 118 S. Ct. 621 (1997). Before to chemical manufacturing, the quality of the ground water beneath the site was considered "excellent." See *id.* Nevertheless, within two years of operation, because of improper chemical waste disposal, the water pumped in for use in the manufacturing process was contaminated. See *id.* at 555-56. Tests conducted in 1964 on the groundwater flowing underneath the facility confirmed the contamination. See *id.* at 555. Chemical manufacturing and waste disposal practices also caused contamination of the soil and surface water at the site. See *id.* at 555-56. Specifically, the owners disposed of wastewaters and other chemical waste in unlined lagoons at the northwestern edge of the property. See *id.* at 556. Because the lagoons were unlined, most of the hazardous material seeped into the ground and water. See *id.* The owners also caused contamination by their burial and slitting of hundreds of drums containing hazardous substances in a sandy pit. See *id.* In addition, hundreds of gallons of chemicals spilled onto the property from train cars. See *id.* Also, the manufacturing companies dumped buckets of hazardous chemicals that spilled during the manufacturing process into the woods on the property. See *id.* Finally, chemical waste frequently overflowed from a cement-lined equalization basin on the property. See *id.* All of this hazardous waste seeped into the ground and "migrated away from the site via the aquifer to the southeast" and

icals on it when Ott I controlled the site from 1957 to 1965.¹¹⁵ In 1965, Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site, as well as the manufacturing operations.¹¹⁶ In 1972, the Story Chemical Company ("Story")

mixed with two waterways named Little Bear Creek and the Unnamed Tributary. *See id.*

115. *See Cordova Chemical*, 113 F.3d at 575. It was during Ott I's ownership of the property that contamination was most severe. *See CPC International*, 777 F. Supp. at 556. Ott I disposed of chemical waste in unlined lagoons, buried drums and overflowing equalization basin and collection buckets. *See id.* Beginning in 1965, when Ott I still owned the facility, it sporadically used purge wells to treat the contamination problem. *See id.* They were mildly successful in cleaning the ground water and slowing the spread of contamination away from the site. *See id.*

Ott I had "an active board of directors that was significantly involved in the management of the company." *Id.* at 557. The leading officer of Ott I was Arnold Ott, who served at various times as president, chief executive officer, treasurer, board member and chairman of the board. *See id.* Arnold Ott was also the company's largest shareholder. *See id.* In 1963, Alexander McFarlane, Corn Products Company's ("CPC") chairman of the board, joined the Ott I board of directors. *See id.* McFarlane was impressed by Ott I, and became interested in acquiring Ott I and its management group. *See id.* In June 1965, the Ott I board approved a reorganization for the purchase of the company by CPC in September. *See id.* Three months before the sale of Ott I, Arnold Ott became a manager at CPC, while continuing to act as Ott I's president, chief executive officer and director. *See id.* In September 1965, CPC created the Four Lakes Chemical Company, a wholly owned subsidiary, for the purposes of acquiring Ott I. *See id.* Immediately before the sale, Four Lakes' board of directors elected its officers, including Arnold Ott and Ott I's vice-president of marketing, James Eiszner, and voted to change the company's name to the Ott Chemical Company ("Ott II"). *See id.* At the end of September, Ott I's assets and specified liabilities were sold to Four Lakes in return for 75,300 shares of CPC common stock. *See id.* Two days after the sale, Four Lakes officially became Ott II. *See id.*

116. *See CPC International*, 777 F. Supp. at 557. Ott II functioned almost identically to Ott I, in that it manufactured the same chemicals at the same plant, with the same disposal practices. *See id.* at 558. Pollution of the soil, surface water and ground water continued through Ott II's ownership of the site as Ott II also allowed chemical waste to seep into the ground from the unlined lagoons, buried drums, overflowing equalization basin and buckets. *See id.* at 555-56. Ott II also attempted to remediate the ground water contamination problem through the use of purge wells. *See id.* at 558. Manufacturing under Ott II, however, significantly increased as a result of contributions from CPC to help it expand. *See id.* Increased production created "substantially greater amounts" of hazardous chemical waste, which was disposed of in newly expanded unlined lagoons. *See id.* In addition to contributing millions of dollars to Ott II's expansion efforts, CPC was actively involved in almost every aspect of Ott II's operations. *See id.* First, CPC officials almost exclusively made up and controlled Ott II's board of directors. *See id.* At all times there were no fewer than three CPC-affiliated directors on Ott II's 11 person board, for nearly three years CPC had majority control, and at one point, CPC controlled the entire board of directors. *See id.* In addition, CPC, as exclusive shareholder of Ott II, controlled the selection of all board members, and when CPC executives were not attending Ott II's board meetings, the CPC directors serving on the Ott II board reported back to CPC about Ott II programs. *See id.* at 558-59. CPC also exerted significant control over Ott II's day-to-day affairs. *See id.* at 559. Although technically Ott II managers made decisions regarding operating policies, CPC actively participated in this decision making through high-ranking CPC officers serving in Ott II management positions. *See id.* In addition,

purchased the site from Ott II and continued operations until it went bankrupt in 1977.¹¹⁷

A concerted effort to remediate the property began in 1977, following Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") assessed the site and tried to attract a purchaser.¹¹⁸ On Octo-

several people served simultaneously as top officials in both CPC and Ott II. *See id.* "CPC officials thus played decisive roles in Ott II's policy-making structure. As top officers at Ott II, these CPC officials exerted significant control and bore ultimate responsibility over decision making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id.* CPC also controlled policy making at Ott II through its "development company," a division of CPC with oversight responsibility over Ott II and other CPC subsidiaries with scientific or technical backgrounds. *Id.* The development company reviewed Ott II's operating procedures, made recommendations regarding finances and personnel, pressured it to generate more profits and decided who would represent CPC on Ott's board. *See id.* at 560. "In sum, CPC engaged in active participation in and significant control over Ott II policy matters and decision-making both internally through representation within Ott II's management and board and externally through the supervision of CPC's development company." *Id.* at 561.

Second, in addition to participating in Ott II's management and board, CPC "actively participated in Ott II environmental matters." *Id.* CPC employed a governmental and environmental affairs director named G.R.D. Williams. *See id.* Williams coordinated all pollution activities for CPC, and starting in 1966, managed Ott II's environmental matters, including choosing a waste disposal system. *See id.* Other CPC officials were also involved in Ott II's waste disposal practices, including negotiating the use of a county wastewater treatment system. *See id.* at 561-62.

Third, CPC controlled all of Ott II's communications with state and federal regulators. *See id.* at 561. When Ott II received questionnaires regarding its waste disposal practices, CPC required it to either consult with CPC for appropriate answers or send it to CPC to answer. *See id.* When Ott II had unannounced visitors from regulators, Williams instructed the company to stall them while awaiting advice from CPC. *See id.*

Fourth, CPC "exerted significant control over Ott II's finances." *Id.* at 562. CPC's development company required Ott II to prepare monthly financial reports, and each year CPC reviewed and approved a "detailed financial plan" for Ott II's financial operations. *See id.* In addition, CPC advanced more than \$5 million to Ott II and assumed a number of its loans. *See id.* Also, CPC required that Ott II obtain approval for capital expenditures, initially more than \$5000, and in 1968, more than \$200,000. *See id.* Finally, and most importantly, Ott II's funds were commingled with CPC's in a joint account. *See id.*

Overall, CPC exerted control over Ott II's finances, its board of directors and officers, its communications with governmental officials and its environmental decisions. *See id.* at 558-62.

117. *See id.* at 562. Story Chemical Company ("Story") purchased the facility for \$6.6 million in cash and a \$4 million note. *See id.* CPC sold Ott II without the knowledge or consent of the Ott II board. *See id.* Story began chemical manufacturing operations in June 1972, but it was suffering from financial problems by 1974. *See id.* In an effort to save money, Story stopped use of the purge well system altogether, "resulting in the continued, unchecked spread of contamination away from the site through groundwater." *Id.* at 556. Story could not recover from financial difficulty and filed for bankruptcy in 1976. *See id.* at 562. Upon the bankruptcy of Story, title to the property vested in the trustee in bankruptcy, who attempted to find a buyer. *See id.*

118. *See id.* Acting in their regulatory capacity, officials from the Michigan Department of Natural Resources (MDNR) visited the site to assess the severity and

ber 13, 1977, Cordova Chemical Company ("Cordova California") agreed to purchase the site and assist in its cleanup.¹¹⁹ Cordova California was about to commence manufacturing operations in 1978 when it created its own wholly owned subsidiary, Cordova Chemical Company of Michigan

nature of its environmental problems. *See id.* The environmental problems on the property were readily apparent. *See id.* As the district court noted:

Groundwater pumped to the surface contained foam and a brownish color like root beer. The stench of chemicals permeated the air. Soil excavation revealed the taint of toxic pollution, showing purplish colors. Hundreds of chemical drums, many piled atop each other, lay around the site, randomly strewn among trees, across pavement and into sandy pits. Many of the drums and barrels were crushed, corroded and leaking, with their contents seeping into the ground. Chemical waste by-products, including thousands of broken bottles, littered the land.

Id. at 562-63. The MDNR found potentially deadly toxins at the site, including tanks of explosive phosgene gas, deadly if released into the air, and probable human carcinogens such as benzene, phenol, methylene chloride and methyl isocyanate. *See id.* at 563. In light of the severity of the environmental problems, the MDNR immediately began efforts to clean up the site. *See id.* At the time, however, there was no environmental legislation such as CERCLA or a state equivalent that would permit the MDNR to clean up the site and then sue for contribution. *See id.* To clean up the site, the MDNR needed a specific legislative appropriation, which it sought to expedite in early 1977. *See id.* Remediation efforts by the MDNR also included looking for a purchaser for the property who would participate financially in cleanup efforts, which would reduce the money needed from the state legislature. *See id.*

119. *See id.* at 564. In March 1977, officials from Aerojet-General Corp., of which Cordova was only a division at the time, met with the MDNR to discuss purchasing the site. *See id.* at 563. At first, Aerojet was not interested, partially because of the severe contamination, but it later entered into negotiations with MDNR to purchase the property. *See id.* at 563-64. Aerojet needed the facility to manufacture ethelenimine, a chemical used in Cordova's manufacturing plant. *See id.* at 563. Negotiations centered around the extent that Aerojet would participate in the cleanup with Aerojet agreeing to fund remediation of some of the pre-existing contamination in exchange for promises about future cleanup obligations. *See id.* at 564. In anticipation of the purchase, Aerojet incorporated the Cordova division as Cordova Chemical Company ("Cordova California"), which became a wholly owned subsidiary of Aerojet. *See id.* On October 13, 1977, MDNR and Cordova California entered into a "stipulation and consent order," and one day later, Cordova California officially purchased Story's assets for \$2.5 million. *See id.* The agreement addressed the cleanup obligations of the respective parties. *See id.* at 564-65. The MDNR agreed to dispose of the approximately 8700 fifty-five-gallon drums of waste and an estimated 8000 cubic yards of solid chemical waste, sludge and soil. *See id.* at 565. Cordova California agreed to eliminate the phosgene gas and pay the MDNR \$600,000 for its cleanup efforts. *See id.* According to the agreement, following Cordova California's payment of the \$600,000, it was not to have "any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary." *Id.* The agreement, however, did not provide a total cleanup of the site's environmental problems because of its silence regarding the ground water contamination problem and the fact that there were 71,000 cubic yards of contaminated soil, rather than the stipulated 8000 cubic yards. *See id.* at 566. The Michigan Legislature appropriated \$1.27 million for MDNR's cleanup of the site, and following its passage, Cordova California and the MDNR fulfilled their cleanup obligations under the agreement. *See id.* at 566, 567.

("Cordova Michigan") and transferred ownership of the site to it.¹²⁰ As the owner of the facility, Cordova Michigan manufactured chemicals there until 1986.¹²¹ In 1981, pursuant to its authority under CERCLA, the EPA became involved with the site by investigating how to remedy the severe environmental problems in the soil and ground water.¹²² The EPA placed

120. *See id.* at 568. After Cordova California's incorporation and acquisition in 1977, it began construction to convert the facility into a manufacturing plant for ethelenimine. *See id.* On November 2, 1978, with construction complete and manufacturing about to begin, Cordova California created Cordova Chemical Company of Michigan ("Cordova Michigan"). *See id.* Cordova California capitalized its subsidiary with \$250,000 in common stock and \$2.8 million in additional paid-in capital. *See id.*

121. *See id.* At the time chemical manufacturing occurred, a subsidiary of Aerojet's subsidiary owned the site. *See id.* Despite their separate corporate existences, however, Cordova California and Cordova Michigan operated as a single entity and performed the functions of the former Cordova division of Aerojet. *See id.*

Cordova California handled the day-to-day operations of Cordova Michigan, including solicitation of business, processing of orders received, marketing, accounting, setting the sales schedule and determining production quotas. *See id.* at 569. Aerojet, however, controlled both Cordovas' board of directors, management and financial affairs. *See id.* at 569-70. After the incorporation of Cordova Michigan, both Cordovas' boards became inactive, never holding a board meeting. *See id.* at 569. In addition, Aerojet employees entirely comprise both boards and they "essentially functioned to consent to the policies established by management." *Id.*

Aerojet employees also completely dominated the management of the Cordova companies. *See id.* For example, numerous individuals simultaneously held positions in Aerojet and either or both of the subsidiaries. *See id.* at 569-70. The president of the three companies was the same person on at least two occasions and many others held the same position in the three companies. *See id.* In addition, managers of the subsidiaries reported directly to Aerojet and Aerojet managed all personnel decisions. *See id.* at 570. "As a result of this widespread involvement in the management of its subsidiaries, Aerojet participated in and controlled decision-making in all facets of the company, including sales, marketing, manufacturing and waste disposal." *Id.*

Finally, Aerojet exercised total financial control over both of the subsidiaries. *See id.* The three companies commingled funds in that neither subsidiary had the authority to open a bank account and all money earned by the subsidiaries was deposited into Aerojet's account. *See id.* In addition, "Aerojet assigned \$25 million in worthless debt owed to it by Cordova Michigan to Cordova California." *See id.*

The Sixth Circuit relied on the district court's observations regarding conditions at the site during Cordova's ownership. *See United States v. Cordova Chem. Co.*, 113 F.3d 572, 575-77 (6th Cir.) (en banc), *cert. granted*, 118 S. Ct 621 (1997). The district court essentially found that neither Cordova company exacerbated the contamination at the site. *See id.* at 577. Cordova Michigan did not bury waste, dump it into the ground or dispose of it in the unlined lagoons. *See id.* Cordova Michigan repaired the equalization basin and chemical sewer system and disposed of its chemical waste off-site. *See id.*

122. *See CPC International*, 777 F. Supp. at 556. Congress enacted CERCLA in 1980, authorizing the President to use the Superfund to pay for the cleanup of a site and then to sue the responsible parties for contribution. *See* 42 U.S.C. § 9607 (1994) (requiring contribution by owners, operator, transporters and generators for remediation of contaminated sites). The President delegated this power to the EPA. *See* Exec. Order No. 12,316, 3 C.F.R. § 168 (1982), *as amended* by Exec. Order No. 12,418, 3 C.F.R. § 187 (1983).

the site on the National Priorities List, and it is currently being cleaned in accordance with the EPA's remediation plan.¹²³

The EPA filed suit against CPC, MDNR, Cordova Michigan, Cordova California and Aerojet, the parent corporation of both Cordova companies.¹²⁴ The district court made extensive findings regarding the site and its various owners, holding CPC, Aerojet, Cordova California and Cordova Michigan liable for cleanup costs under section 107(a) of CERCLA.¹²⁵ The court did not hold MDNR liable.¹²⁶ Aerojet, CPC, Cordova California and Cordova Michigan appealed to the Sixth Circuit, which reversed the

123. See *CPC International*, 777 F. Supp. at 556. Congress included the National Priorities List as part of CERCLA to list the locations in need of long-term action. See *id.* The Dalton Township site was ranked 137th among the most contaminated sites in the country. See *id.* At the time the district court heard the case, the EPA was developing a three-phase, multi-million dollar plan to remediate the soil, surface water and ground water at the site. See *id.*

124. See *id.* at 554. The district court, by prior order separated the case into three phases: liability, remedy and insurance coverage. See *id.* at 554 n.1. In *CPC International*, the court adjudicated the liability phase, the result of which was ultimately heard on appeal in *Cordova Chemical*. See *Cordova Chemical*, 113 F.3d at 572.

125. See *CPC International*, 777 F. Supp. at 581. The EPA, MDNR and the Cordova defendants asserted that CPC was liable as a past owner or operator of the site. See *id.* at 571. The district court, relying on the language of the statute, adopted the actual control test for determining parent corporation operator liability. See *id.* at 573. The court considered numerous factors when determining whether to hold CPC liable as an operator, including CPC's participation in Ott II's board of directors and in policy matters such as manufacturing, finances, personnel and waste disposal. See *id.* After making a fact-specific inquiry, the district court held "CPC is directly liable under section 107(a)(2) as an operator because CPC actively participated in and exerted significant control over Ott II's business and decision-making." *Id.* at 574. The court found it unnecessary to consider CPC's owner liability under common law veil piercing. See *id.* at 575.

As for Aerojet and its subsidiaries, the EPA, MDNR and CPC asserted claims for current owner and operator liability, past owner or operator liability and arranger liability. See *id.* at 578. As to present owner liability, the district court found liability to turn on the question of whether piercing Aerojet's corporate veil was appropriate. See *id.* Applying state piercing law and engaging in a fact specific inquiry, the court pierced Aerojet's veil, holding both Aerojet and Cordova Michigan liable as the current owners of the site. See *id.* at 578-79. The court imposed owner liability under section 107(a)(2) on Cordova California because it was the owner of the site from October 1977 to November 1978, a period in which hazardous waste disposal occurred. See *id.* at 579. The court assessed Aerojet's liability, as a parent corporation, under the same standard applied to CPC and held Aerojet directly liable. See *id.* at 580. Because the district court imposed direct liability on Aerojet, it did not apply the piercing the corporate veil test. See *id.* Therefore, the court held Aerojet and Cordova Michigan liable as present owners of the facility, and held Aerojet and Cordova California liable as owners or operators at the time disposal occurred. See *id.* at 580-81.

126. See *id.* at 581. CPC and the Cordova defendants alleged MDNR should be liable as an operator and CPC alleged MDNR was liable as an arranger at the site. See *id.* at 576. On the arranger liability issue, the district court found that MDNR and Cordova California made no arrangement with respect to the ground-water contamination, and therefore, there could be no arranger liability. See *id.* at 576-77. Regarding operator liability, the court found that although a state can be liable as an operator in circumstances "when it permits hazardous waste disposal to

district court's decision in part and affirmed in part.¹²⁷ Three months after the Sixth Circuit's decision, the court granted a rehearing of the case en banc, vacating the earlier appellate decision and restoring the case to the docket as pending appeal.¹²⁸

B. *The Sixth Circuit's Analysis*

The issue before the Sixth Circuit was what standard the court should apply in determining the liability of a parent corporation under CERCLA for pollution on a subsidiary's property.¹²⁹ The court held that a parent corporation could be held liable as an operator under CERCLA only when the requirements for piercing the corporate veil are met.¹³⁰ The Sixth Circuit began its analysis by examining CERCLA's liability provisions to determine who could be potentially liable for the cleanup costs of a polluted site.¹³¹ The court determined that the potentially responsible parties relevant to this case were the present owner and operator of the facility and the owner or operator of the facility at the time of the hazard-

occur at a site over which it exercises dominion or control," MDNR actions were insufficient to constitute such control. *Id.* at 577-78.

127. See *United States v. Cordova Chem. Co.*, 59 F.3d 584, 593 (6th Cir.) (reversing judgments of liability against CPC, Aerojet and both of its subsidiaries), *vacated*, 67 F.3d 586 (6th Cir. 1995). The Sixth Circuit voted 2-1 to overturn the district court's ruling, concluding "that a parent corporation incurs operator liability pursuant to section 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met under state common law." *Sixth Circuit Votes 2-1 to Overturn Liability Ruling Against PRP's*, MEALEY'S LITIG. REP., July 26, 1995, at 3. The Sixth Circuit's holding en banc was almost identical to its earlier decision. See *6th Cir. Stands by Prior Determinations on Parent Company Liability*, ANDREWS HAZARDOUS WASTE LITIG. REP., May 19, 1997, at 32,296, 32,296 [hereinafter *6th Cir. Stands*] (noting that "bulk of the new majority [opinion] otherwise restated *Cordova I's* conclusions verbatim"). The Sixth Circuit affirmed the district court's holding that MDNR was not liable as an arranger. See *Cordova Chemical*, 59 F.3d at 591 (finding MDNR's good faith, but unsuccessful, effort to address groundwater contamination problem was unfortunate "but does not subject the agency to liability").

128. See *United States v. Cordova Chem. Co.*, 67 F.3d 586, 586 (6th Cir. 1995) (noting that majority of court in regular active service voted for rehearing of case), *cert. granted sub nom.*, *United States v. CPC Int'l, Inc.*, 118 S. Ct. 621 (1997). The previous decision and judgment of the court was vacated. See *id.* ("The effect of the granting of a hearing *en banc* shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.").

129. See *Cordova Chemical*, 113 F.3d at 575.

130. See *id.* at 580. The court stated that:

[W]hether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.

Id.

131. See *id.* at 577 (citing 42 U.S.C. § 9607(a) (1994) and stating that "[s]ection 107(a) of CERCLA lists the parties who are potentially liable for the cleanup costs of a polluted site").

ous waste disposal.¹³²

Next, the Sixth Circuit recognized that Congress intended CERCLA to be a remedial statute, but found that the specific as opposed to the general goals of Congress were difficult to discern.¹³³ Therefore, the Sixth Circuit found that courts are not justified in relying on CERCLA's remedial nature as a basis for "filling in the blanks left by this sketchy legislative history to impose liability under nearly every conceivable scenario."¹³⁴ On the contrary, the court proceeded to analyze the instant case by adhering to the idea that courts should impose CERCLA liability only on culpable parties who helped create the harmful conditions.¹³⁵

132. *See id.* There were no issues as to whether the Dalton Township property was a "facility" within the meaning of the statute, whether it contained "hazardous substances," that "releases" have occurred and threaten to occur and that CPC, the MDNR, Aerojet, Cordova California and Cordova Michigan were all "persons" under the statute. *See CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 556 (W.D. Mich. 1991) (listing parties' stipulations before trial), *aff'd in part, rev'd in part sub nom.*, *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir.) (en banc), and *cert. granted*, 118 S. Ct. 621 (1997). Therefore, the only issue in dispute was the appropriate standard for determining whether any of the parties qualified as a present owner and operator of the facility or a prior owner or operator of the facility. *See Cordova Chemical*, 113 F.3d at 575.

133. *See Cordova Chemical*, 113 F.3d at 578 (finding specific goals difficult to "divine" because statute "represents an eleventh hour compromise" (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-42 (2d Cir. 1985)). The court noted that "Congress enacted CERCLA as a 'remedial statute designed to protect and preserve public health and the environment.'" *Id.* at 577 (quoting *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990)). As a result, without specific congressional intent to the contrary, "courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals." *Id.*

134. *Id.* at 578. CERCLA was an eleventh-hour compromise, enacted by a lame-duck Congress and President. *See Shore Realty*, 759 F.2d at 1040 (noting final version of statute was compromise "put together" by sponsors of earlier versions of bill). As a result, there is little legislative history that directly refers to the statute and some of its provisions are vague. *See id.* (finding, however, that "the evolution of the [earlier] legislation provides useful guidance to Congress's intentions"). The Sixth Circuit stated that, although CERCLA is a remedial statute and "the liability provisions concerning facility operators should be construed so that financial responsibility for cleanup operations falls upon those entities that contributed to the environmental problem," courts are not justified in casting "the widest net possible . . . in order to snare those who are innocently or tangentially tied to the facility at issue." *Cordova Chemical*, 113 F.3d at 578. More appropriately, the court found "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*.'" *Id.* (quoting *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir. 1991)).

135. *See Cordova Chemical*, 113 F.3d at 578. The court's interpretation of CERCLA, requiring culpability for liability, seems to be directly opposed to the nearly unanimous interpretation that the statute imposes strict liability. *See, e.g.*, *United States v. Cello-Foil Prods.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("[I]f the tortured history of CERCLA litigation has taught us one lesson, it is that CERCLA is a strict liability statute."); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("CERCLA imposes strict liability."); *Kayser-Roth*, 910 F.2d at 28 (stating that "[u]nder this strict liability statute, all that it is necessary to prove" is that defendant was one of enumerated potentially responsible parties); *Shore Realty*, 759 F.2d

The Sixth Circuit then turned to the district court's conclusions.¹³⁶ The district court found that the "owned or operated" language in section 107(a)(2) forged a "new, middle ground" between broad CERCLA liability and the tradition of limited liability for corporate parents.¹³⁷ To accommodate both of these concepts, a parent corporation cannot be held liable "simply because [it] has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent

at 1042 ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise.").

136. See *Cordova Chemical*, 113 F.3d at 578.

137. See *id.* The district court reasoned that under CERCLA, liability could attach to a parent corporation in two ways: (1) direct liability as an operator or (2) indirect liability as an owner by piercing the corporate veil. See *CPC International*, 777 F. Supp. at 571-72. The district court relied on the liability language of CERCLA and found that although it was lacking in specificity, "the plain language of CERCLA makes it unmistakably clear that direct liability may attach to parties other than the actual owners of hazardous waste facilities." *Id.* at 572. The court concluded that to find that the statute mandates actual ownership would be to disregard the express owned or operated language of the statute, and therefore "reading the statute to employ only traditional concepts of ownership and liability through veil-piercing would require a court to ignore not only the statute's broadly remedial intent, but also its explicit words." *Id.* After concluding that liability could attach to a parent corporation if it "acted in a manner that constitutes operation of a facility," the district court then addressed what kind of activity is necessary for liability to attach. See *id.* Accordingly, the court adopted a "middle ground" standard, whereby a parent corporation is protected by limited liability as long as it interacts with its subsidiary "in a manner merely consistent with their investment relationship," but will be subject to direct liability if it "actually operate[s] the business of its subsidiary." *Id.* at 573.

The district court's view comports with the views of many courts and commentators who have interpreted this section of CERCLA. See *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) (balancing interests of limited liability and CERCLA liability scheme in adopting actual control direct liability standard); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (finding that Congress expanded circumstances when parent corporation can be liable and supporting adoption of direct liability standard); *Kayser-Roth*, 910 F.2d at 26 (finding that direct liability through actual control is supported by statute); Gary Allen, *Refining the Scope of CERCLA's Corporate Veil Piercing Remedy*, 6 STAN. ENVTL. L.J. 43, 51-52 (1987) (discussing ways CERCLA liability currently can attach to parent corporations and asserting that to meet statute's goals, "categorical liability" should be imposed on parent corporations); Aronovsky & Fuller, *supra* note 3, at 426 (finding that, in enacting CERCLA, Congress intended that costs of remedial actions shift from public to private parties, including parent corporations); *Liability of Parent Corporation*, *supra* note 53, at 987-88 (stating that imposing direct CERCLA liability on parent corporations is economically and legally favorable).

In the instant case, because CPC never actually owned the Dalton Township property, it could not be directly liable as an owner. See *CPC International*, 777 F. Supp. at 555 (noting that Ott II, wholly owned subsidiary of CPC International, owned site). Therefore, liability could only attach indirectly through corporate veil piercing, or directly, as an operator. See *id.* at 581. The Sixth Circuit noted that for the district court to hold CPC liable as an operator, it "necessarily had to hold CPC, as a parent corporation, accountable for the environmental conduct of its wholly owned subsidiary corporation, Ott II." *Cordova Chemical*, 113 F.3d at 579.

must have actually operated the business of its subsidiary.”¹³⁸ Applying this standard, the district court concluded that CPC and Aerojet were liable as operators for the disposal of waste that occurred while their subsidiaries operated the Dalton Township site.¹³⁹

The Sixth Circuit took issue with the district court’s new middle ground between CERCLA liability and limited liability, finding it to be unsupported by the statute.¹⁴⁰ Specifically, CERCLA defines “owner or operator of an onshore facility” as “any person owning or operating such facility.”¹⁴¹ When an owner conveys a facility to a state or local government, however, the definition reads “‘any person who owned, operated or otherwise controlled activities at such facility’ immediately” before the transfer to the governmental authority.¹⁴² Relying on the difference between the definitions, the Sixth Circuit concluded “that the drafters of the statute distinguished an operator from a person who ‘otherwise controlled’ a facility.”¹⁴³ An example of an operator, according to the court, is one hired by an owner to run the daily operations of a facility.¹⁴⁴ A parent corporation, however, that “actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations law . . . [does not] assume[] the role of operator.”¹⁴⁵

In addition, the Sixth Circuit found the district court’s opinion un-

138. *CPC International*, 777 F. Supp. at 573. In essence, without actually saying it, the district court adopted the actual control standard. *See id.*; *see also Kayser-Roth*, 910 F.2d at 27 (“To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary.”).

139. *See CPC International*, 777 F. Supp. at 581. Regarding CPC, the district court held it liable because “the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary’s board and management and externally through the policies of the development company and the actions of individual CPC officials.” *Id.* at 575. The court held Aerojet liable because it concluded that Aerojet “operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.” *Id.* at 580.

140. *See Cordova Chemical*, 113 F.3d at 579. The court stated: “We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of an undefined ‘new, middle ground.’” *Id.* Specifically, the court found the district court’s new middle ground threatened “the efficacy of time-honored limited liability protections afforded by the corporate form” without an express statement by Congress that that was what it intended to do. *Id.* Agreeing with the Fifth Circuit in *Joslyn Manufacturing*, the Sixth Circuit found that “[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so.” *Id.* at 579-80 (alterations in original) (quoting *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990)).

141. 42 U.S.C. § 9601(20)(A)(ii) (1994).

142. *Cordova Chemical*, 113 F.3d at 579 (quoting 42 U.S.C. § 9601(20)(A)(iii)).

143. *Id.*

144. *See id.*

145. *Id.*

clear.¹⁴⁶ For example, in defining the scope of the new middle ground standard, the Sixth Circuit noted that the district court used the phrases “actual operation of the subsidiary’s business” and “the exertion of power or influence through active participation in the subsidiary’s business” interchangeably.¹⁴⁷ The Sixth Circuit, however, found the concepts were not interchangeable and that CPC would only have been liable under the latter standard, “underscor[ing] the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA.”¹⁴⁸

Finally, the Sixth Circuit found the district court’s new, middle ground to be problematic for two other reasons.¹⁴⁹ First, the district court’s approach was “nebulous,” while the traditional doctrine of piercing the corporate veil provides a “relatively bright line” for determining parent liability.¹⁵⁰ Second, the threat of unlimited corporate liability would have a chilling effect on participation by outside parties in facility remediation efforts.¹⁵¹

Based on the reasons described above, the Sixth Circuit rejected the district court’s new middle ground and adopted a piercing the corporate veil standard.¹⁵² Accordingly, under the circuit court’s opinion:

[W]hether the parent will be liable as an operator depends upon

146. *See id.*

147. *Id.*

148. *Id.* The court posited a third standard, not mentioned in the district court’s opinion, in which CERCLA could impose liability on a parent corporation: where the parent independently operates the facility “in the stead of its subsidiary,” or in the case of a joint venturer, “alongside its subsidiary.” *Id.*

149. *See id.* at 580.

150. *See id.* The court questioned how courts are to tell “[w]hen, precisely, . . . a parent [is] acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability.” *Id.* Although the district court provided factors to guide courts in applying its standard, the Sixth Circuit found them largely unhelpful. *See id.* (“The indicia enumerated by the district court, such as participation in the subsidiary’s board of directors and involvement in specific policy decisions, offer little guidance.”). Finally, the court noted that “these activities are not grounds traditionally relied upon as warranting the disregard of separate corporate existences.” *Id.*

151. *See id.* The court found the instant case to be illustrative of its point, in that MDNR sought a private sector investor to remediate the site, contracting with Aerojet and the Cordova defendants. *See id.* The court found that “[t]o scuttle such sensible and legitimate precautions in favor of an unpredictable ‘control’ test would actually contravene the public interest by discouraging businesses from being involved in such projects.” *Id.*

152. *See id.* The Sixth Circuit held:

[W]e reject the district court’s “new, middle ground” as the basis for fixing operator liability and hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met.

Id.

whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.¹⁵³

The circuit court applied state law in determining whether it should pierce the corporate veil and ultimately concluded that there was insufficient evidence to warrant the piercing.¹⁵⁴

The Sixth Circuit summarized its holding by saying that under section 107(a)(2) of CERCLA, there are three potential scenarios under which a parent corporation could be liable as an operator: (1) under the standard adopted by the circuit court as an owner by piercing the corporate veil; (2) as an operator when the parent directly operates the facility itself; and (3) under the new, middle ground standard adopted by the district court.¹⁵⁵ The second liability scenario was not present in the instant case, and because the Sixth Circuit rejected the third scenario, the court concluded that "traditional veil piercing is the only standard under which . . . liability can be assessed reliably."¹⁵⁶ Accordingly, the Sixth Circuit reversed the district court's finding of operator liability with respect to CPC.¹⁵⁷

The Sixth Circuit reached a similar result regarding Aerojet's operator liability.¹⁵⁸ The court held that the veil piercing test was the appropri-

153. *Id.*

154. *See id.* at 580-81. Under Michigan law, two requirements must be met in order to pierce: (1) "such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist" and (2) "the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Id.* at 580; *see Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir. 1989) (surveying Michigan corporate veil piercing decisions); *Seasword v. Hilti, Inc.*, 537 N.W.2d 221, 224 (Mich. 1995) (describing Michigan veil piercing law as requiring both fraud and that parent had treated subsidiary as mere instrumentality). The district court found there was sufficient evidence to hold CPC directly liable, but the Sixth Circuit held this evidence was insufficient to pierce CPC's veil. *See Cordova Chemical*, 113 F.3d at 581 (holding that 100% stock ownership, participation in subsidiary's board of directors, "cross-pollination of officers," active participation by CPC in environmental matters and financial control were insufficient evidence to warrant piercing). The Sixth Circuit's decision to apply state law in determining whether to pierce the corporate veil is another contentious point of this opinion, albeit outside of the scope of this Note. For a discussion of the appropriate law to apply in this situation, see Jeanette M. Bowers, *A Parent Corporation's Potential Liability for Acts of Its Dissolved Missouri Subsidiary Corporation*, J. Mo. B., May-June 1997, at 145, 148-49.

155. *See Cordova Chemical*, 113 F.3d at 581.

156. *Id.* The Sixth Circuit failed to distinguish between "owner" and "operator" liability under CERCLA and it mistakenly used the terms interchangeably in the summation of its holding. *See id.* (holding veil piercing was standard to adjudge owner liability and then reversing district court's finding of operator liability).

157. *See id.*

158. *See id.* at 583.

ate measure of liability, but that they would not pierce because there was insufficient evidence.¹⁵⁹ Therefore, Aerojet was not held liable as an operator.¹⁶⁰

IV. CRITICAL ANALYSIS

The Sixth Circuit held that a court must pierce the corporate veil in order to attach operator liability to a parent corporation.¹⁶¹ This Note suggests that the Sixth Circuit's conclusion was incorrect because it misinterpreted CERCLA and hindered the accomplishment of its remedial goals. First, the court premised its decision on a misinterpretation that CERCLA imposes liability only on culpable parties.¹⁶² Second, the piercing the corporate veil standard severely hinders accomplishment of the statute's remedial purpose.¹⁶³ Third, the Sixth Circuit's holding does not comport with the plain statutory language of CERCLA.¹⁶⁴ Fourth, contrary to the court's assertion, imposing direct liability on parent corporations will not deter private sector cleanups.¹⁶⁵ Fifth and finally, contrary to the court's assertion, the standard adopted by the district court and a majority of the other circuits will not result in confused interpretation of CERCLA liability law.¹⁶⁶ Instead of adopting the piercing the corporate veil standard for parent liability, the Sixth Circuit should have followed the majority of circuits and adopted the actual control standard.¹⁶⁷ The ac-

159. *See id.* at 582. The court considered such evidence as Aerojet's active participation in the acquisition of the Dalton Township site, its total ownership of the subsidiary, the timing of the incorporation of the subsidiaries, "cross-pollination" of corporate officers, financial control and the integration of the businesses. *See id.*

160. *See id.* at 583.

161. *See id.* at 580.

162. *See id.* at 578. *But see* *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 28 (1st Cir. 1990) (noting CERCLA is strict liability statute). For a discussion of CERCLA's strict liability standard, see *infra* notes 170-82 and accompanying text.

163. For a discussion of CERCLA's remedial purpose and why courts should construe the statute liberally, see *infra* notes 183-209 and accompanying text.

164. For a discussion of the proper interpretation of CERCLA's owned or operated language, see *infra* notes 210-30 and accompanying text.

165. For a discussion of the economic ramifications of the direct liability standard, see *infra* notes 231-45 and accompanying text.

166. For a discussion of the factors applied in the actual control test and their relatively predictable result, see *infra* notes 246-65 and accompanying text.

167. *See, e.g.,* *Schiavone v. Pearce*, 79 F.3d 248, 255 (2d Cir. 1996) (adopting actual control standard, finding it compatible with statutory language and broad remedial scheme); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994) (finding support in legislative history for adopting actual control standard); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1220-21 (3d Cir. 1993) (holding "district court, by applying the 'actual control' test, applied the correct legal standard with respect to the operator liability issue"); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (finding that in parent corporation context, "[t]he plain language of the statute leads to the conclusion that a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play

tual control standard most closely resembles and effectuates the intent of Congress in enacting CERCLA, as evidenced by the language of the statute and its legislative history.¹⁶⁸

A. CERCLA Imposes Strict Liability

In determining the appropriate standard for parent operator liability, the Sixth Circuit premised its conclusion on the "tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions" at a facility.¹⁶⁹ The term culpable is defined as "at fault."¹⁷⁰ Other courts, however, consistently interpret CERCLA as imposing strict liability or liability without regard to the fault of the party.¹⁷¹

an active role in the actual management of the enterprise."); *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (holding majority shareholders cannot "hid[e] behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by [CERCLA]"); *Kaysen-Roth*, 910 F.2d at 27 (interpreting statute to support imposition of liability on parent corporation when it is actively involved in subsidiary's activities).

168. For a discussion of the plain language of CERCLA as support for the actual control standard, see *infra* notes 210-30 and accompanying text. For a discussion of CERCLA's legislative history as support for the actual control standard, see *infra* notes 183-209 and accompanying text.

169. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 578 (6th Cir.) (en banc), *cert. granted*, 118 S. Ct. 621 (1997).

170. BLACKS'S LAW DICTIONARY 379 (6th ed. 1990). Strict liability is liability without fault and in the CERCLA context, it is "liability without fault for releases or threatened releases of hazardous substances." *Stewart & Campbell*, *supra* note 28, at 7; see *Sandvos*, *supra* note 9, at 869 (finding liability attaches to parties defined in statute without regard to fault).

171. See, e.g., *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996) ("[I]f the tortured history of CERCLA litigation has taught us one lesson, it is that CERCLA is a strict liability statute."); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) ("CERCLA imposes strict liability."); *Kaysen-Roth*, 910 F.2d at 28 (stating that "[u]nder this strict liability statute, all that it is necessary to prove" is that defendant was owner or one of enumerated potentially responsible parties); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (discussing reasons why CERCLA is strict liability statute); *Idylwoods Assocs. v. Mader Capital, Inc.*, 956 F. Supp. 410, 412 (W.D.N.Y. 1997) (noting that CERCLA imposes strict liability for costs of hazardous substance releases). One commentator noted:

Although CERCLA does not state explicitly a scheme of liability, courts consistently have interpreted CERCLA as creating strict, joint and several liability. Thus, without regard for notions of intent or fault, full liability for all cleanup costs extends to any person falling in one of the four categories of responsible parties.

Sandvos, *supra* note 9, at 869. In addition, courts are mindful of the fact that strict liability will sometimes impose financial responsibility on a party that is the least responsible for the waste disposal, which the statute intended. See *Idylwoods*, 956 F. Supp. at 417-18 (noting effects of CERCLA's strict liability regime). The *Idylwoods* court stated: "CERCLA envisions that sometimes the cleanup must be paid for by those least responsible because those who are most responsible lack funds or cannot be found. It tempers its severity with an apportionment principle and with

Although CERCLA does not expressly impose strict liability, there is evidence in the statute and its legislative history that supports the nearly unanimous interpretation that CERCLA liability is strict.¹⁷² First, section 9601(32) of the statute defines the terms “liable” and “liability” as the same standard of liability as under 33 U.S.C. § 1321, the Clean Water Act.¹⁷³ Courts have consistently construed the Clean Water Act as imposing strict liability.¹⁷⁴ Therefore, in accordance with the statutory definition, liability is strict under CERCLA.¹⁷⁵

Second, the legislative history of CERCLA clearly indicates that Congress intended liability to be strict.¹⁷⁶ Prior to passage, there were differ-

limited defenses that are rarely available.’” *Id.* at 418 (quoting *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1537 (E.D. Cal. 1992)); *see* H.R. REP. NO. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 (finding that CERCLA liability is strict and “may be imposed without fault, and each responsible party may be held liable for the entire cost of cleanup, even if that party’s contribution to the waste site was minimal”). In 1989, the Sixth Circuit even recognized that “[t]he plain language of section 9607(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste.” *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989) (quoting *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988)). Therefore, in *Cordova Chemical*, the Sixth Circuit contradicted its prior holding by requiring culpability for CERCLA liability. *See Cordova Chemical*, 113 F.3d at 578 (adhering to “tenet” that culpability is required for CERCLA liability).

The imposition of strict liability also comports with the goals of CERCLA, as well as its remedial nature. *See Idylwoods*, 956 F. Supp. at 418 (noting that “a CERCLA regime which rewards indifference to environmental hazards and discourages voluntary efforts at waste cleanup [could] not be what Congress had in mind” in enacting the statute (quoting *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845-46 (4th Cir. 1992))). In this regard, by imposing strict liability, Congress encouraged an active approach to environmental hazards and waste cleanup, thereby effectuating the statute’s purpose of remediating hazardous waste sites. *See Stewart & Campbell*, *supra* note 28, at 8 (finding that liability scheme under CERCLA encourages firms to be proactive in investigating environmental practices at site and in abating environmental harm).

172. *See Shore Realty*, 759 F.2d at 1042 (“Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise.”); *see also* 42 U.S.C. § 9601(32) (1994) (providing definition of “liable” and “liability”); S. REP. NO. 96-848, at 34 (1980).

173. *See* 42 U.S.C. § 9601(32) (stating that “liability” is to be “construed to be the standard of liability which obtains under” Clean Water Act); *see also Shore Realty*, 759 F.2d at 1042 (noting CERCLA’s definition of “liability” is same as Clean Water Act).

174. *See, e.g., United States v. Brace*, 41 F.3d 117, 122 (3d Cir. 1994) (noting that “[u]npermitted discharge is the archetypal Clean Water Act violation, and subjects the discharger to strict liability” (quoting *United States v. Pozsgai*, 999 F.2d 719, 724-25 (3d Cir. 1993))); *Shore Realty*, 759 F.2d at 1042 (stating that courts have held standard of liability under Clean Water Act to be strict); *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 613 (4th Cir. 1979) (finding that final version of statute included strict liability scheme).

175. *See Shore Realty*, 759 F.2d at 1042 (interpreting statutory definition of “liability” to mean strict liability).

176. *See* 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (stating that “the standard of liability is intended to be the same as that provided in section 311 of the Federal Water Pollution Control Act. I understand this to be a standard

ent versions of CERCLA in the House and Senate, both of which expressly provided for strict, joint and several liability.¹⁷⁷ As part of the compromise in drafting the final version of the statute, however, CERCLA's sponsors replaced the express strict liability language with the reference to the Clean Water Act.¹⁷⁸ Nonetheless, Congress still understood CERCLA to impose strict liability.¹⁷⁹ For example, Representative Florio, one of the sponsors of the compromise version of the bill, stated that although "[t]he liability provisions of this bill do not refer to the term[] strict . . . liability, . . . the strict liability standard . . . is preserved."¹⁸⁰ Therefore, it is apparent that the tenet underlying the Sixth Circuit's decision in *Cordova Chemical* was incorrect, and therefore, the remainder of the opinion, which relies upon this tenet, is likewise incorrect.¹⁸¹

of strict liability."). Both sponsors of the compromise bill expressly stated that CERCLA imposes strict liability. See *id.* (statement of Sen. Randolph) (stating that strict liability, by reference to Clean Water Act, is retained in compromise bill); *id.* at 31,965 (statement of Rep. Florio) (stressing that liability under CERCLA is strict, although statute does not expressly state such). The DOJ concurred in the understanding that CERCLA liability was intended to be strict. See *id.* at 778 (stating liability under Clean Water Act was strict liability). The Senate also recognized the strict liability standard of section 311 created strict CERCLA liability. See *id.* at 735 (statement of Sen. Dole) ("It also makes sense to incorporate a definition of strict liability that will serve as a uniform standard in determining liability for cleanup and other costs, and this has been achieved by reference to the Clean Water Act."); *id.* at 740 (statement of Sen. Culver) ("The committee bill . . . makes those who release hazardous substances strictly liable for cleanup costs, mitigation and third-party damages. Thus, it assures that the costs of chemical poison releases are borne by those responsible for the releases.").

177. See S. 1480, 96th Cong. § 4(a) (1980) (stating that except when person otherwise liable can establish defense, owner, operator, arranger or transporter "shall be jointly, severally, and strictly liable" for remediation costs); H.R. 7020, 96th Cong. § 3071(a)(1)(D) (1980) (providing that except for certain defenses, "any person who caused or contributed to the release or threatened release shall be [strictly] liable for such costs [and] . . . such liability shall be joint and several with any other person who caused or contributed to such release").

178. See 126 CONG. REC. 30,932 (statement of Sen. Randolph) ("We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act . . ."); 126 CONG. REC. 31,965 (statement of Rep. Florio) (noting that drafters replaced strict liability language with reference to Clean Water Act, but "despite the absence of these specific terms, the strict liability standard . . . is preserved").

179. See S. REP. NO. 96-848, at 34 (1980) (noting that strict liability scheme is established under statute); see also *Shore Realty*, 759 F.2d at 1042 (stating that Congress understood liability under CERCLA to be strict).

180. 126 CONG. REC. 31,965 (statement of Rep. Florio).

181. Compare *United States v. Cordova Chem. Co.*, 113 F.3d 572, 578 (6th Cir.) (en banc) (adhering to tenet "that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions"), cert. granted, 118 S. Ct. 621 (1997), with 126 CONG. REC. 30,932 (statement of Sen. Randolph) (stating that by "specifying the standard of liability under section 311 of the Clean Water Act," statute retained strict liability), and *Shore Realty*, 759 F.2d at 1042 ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise.").

B. *Courts Must Construe Remedial Statutes Liberally*

In addition, the piercing the corporate veil standard for operator liability that the Sixth Circuit adopted frustrates the congressional goals of CERCLA. Congress enacted CERCLA as a remedial statute with two primary goals: (1) to provide for the cleanup of hazardous substances and (2) to hold responsible parties financially liable for the cleanups.¹⁸²

As a basic principle of statutory construction, courts should liberally construe remedial statutes.¹⁸³ This liberal construction allows courts to "effectuate the remedial purpose for which [the statute] was enacted."¹⁸⁴ Under a liberal construction, courts can extend the language of the statute "to include matters within the spirit or purpose" of the statute to effectuate its intent.¹⁸⁵ Courts, however, must be reasonable in liberally construing statutes "in order to stay within the prerogatives of the legislature."¹⁸⁶

When courts apply these principles to CERCLA interpretation, it is clear that they should liberally construe the statute to effectuate its goals.¹⁸⁷ Accordingly, courts can extend the statute to matters that, although not expressly stated, are within the "spirit or purpose" of the statute.¹⁸⁸ The Sixth Circuit, however, failed to adhere to this principle by refusing to recognize the broad range of liability intended by the defini-

182. See H.R. REP. NO. 99-253, pt. 3, at 15 (1986), *reprinted in* 1986 U.S.C.A.N. 3038, 3038 (listing goals of CERCLA as cleanup of hazardous substances at expense of responsible parties); Chandler & Grosser, *supra* note 3, at 14 (characterizing goal of cleanup of hazardous substances at responsible parties' expense as "Congress's fundamental purpose[] in enacting CERCLA").

183. See ENDLICH, *supra* note 29, § 107, at 141 (stating that most liberal statutory construction is given to remedial statutes); 3 SINGER, *supra* note 29, § 60.01, at 55 (stating that liberal construction is necessary "to suppress the evil and advance the remedy" of remedial statutes). In a statutory construction analysis, "[m]uch . . . depend[s] on whether a statute is characterized as remedial or as one which is penal or in derogation of the common law." *Id.* Courts uniformly characterize CERCLA as remedial. See, e.g., Schiavone v. Pearce, 79 F.3d 248, 253 (2d Cir. 1996) (noting Congress enacted CERCLA with expansive, remedial purpose).

184. 3 SINGER, *supra* note 29, § 60.01, at 55; see ENDLICH, *supra* note 29, § 107, at 142 (finding courts are to liberally construe remedial statutes "to carry out the purpose of the enactment, suppress the mischief and advance the remedy contemplated by the Legislature").

185. 2A SINGER, *supra* note 29, § 58.06, at 723; see ENDLICH, *supra* note 29, § 110, at 144 ("Sometimes the governing principle of the remedial enactment has been extended to cases not included in its language, to prevent a failure of justice, and consequently of the probable intention.").

186. 3 SINGER, *supra* note 29, § 60.01, at 55; see ENDLICH, *supra* note 29, § 110, at 146 (stating that extending interpretation beyond words of statute does not apply when statute is "too explicit" to warrant such extension).

187. See Russo, *supra* note 28, at 157 ("[C]ourts consider CERCLA a remedial statute, and therefore, construe it liberally to effectuate its goals, particularly the goal of responsible parties bearing the cost of cleanup.").

188. See 2A SINGER, *supra* note 29, § 58.06, at 723 (noting that "a statute is liberally construed when its letter is extended to include matters within the spirit or purpose of the statute").

tion of "owner or operator."¹⁸⁹

CERCLA defines an "owner or operator" as "any person owning or operating such facility."¹⁹⁰ The statute defines "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body."¹⁹¹ Courts interpret these definitions as indicative of the types of parties that can be owners or operators, rather than as an exhaustive list.¹⁹² For example, the Second Circuit, in *Schiavone* interpreted the word "person" to include parent corporations, which provided "additional justification" for including a parent corporation as an operator under CERCLA.¹⁹³ The court adopted the rationale of the Third Circuit and stated: "'CERCLA's language, therefore, indicates an intent to hold a corporation liable for the environmental violations of its subsidiaries . . . if it is otherwise determined to have operated the facility in question.'"¹⁹⁴

In determining the appropriate standard to adopt, the *Schiavone* court also considered the piercing the corporate veil approach, which the Fifth and Sixth Circuits followed, noting that "'[s]ignificantly, CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries.'"¹⁹⁵ Although the court was "not unmindful of the weighty concerns expressed by the Fifth and Sixth Circuits," it chose the actual control standard, finding it "consistent with CERCLA's broad remedial scheme."¹⁹⁶ Consequently, it is both reasonable and within the purpose of CERCLA to include parent corporations in the definition of "owner or operator" and, therefore, to consider them

189. See *Schiavone v. Pearce*, 79 F.3d 248, 253, 255 (2d Cir. 1996) (finding remedial construction of statute, in light of legislative purpose, supports characterization of parent corporations as owners or operators); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1219-21 (3d Cir. 1993) (discussing whether parent corporation qualifies as "covered person" in that it is owner or operator under CERCLA); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 404-05 (1st Cir. 1993) (recognizing other courts broadly interpret CERCLA "owned or operated" language to include successor and parent corporations); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 n.5 (1st Cir. 1990) (characterizing statutory definition of person as extremely broad, indicating parent corporation can be owner or operator).

190. 42 U.S.C. § 9601(20)(A)(ii) (1994).

191. *Id.* § 9601(21).

192. See *Lansford-Coaldale*, 4 F.3d at 1221 n.11 (indicating person includes "a firm, corporation, or commercial entity, among other things"). The Third Circuit determined that "other things," beyond those listed in the statute, were included as persons. *Id.* By expanding the definition of person beyond the express language, the court found that CERCLA's list of potential owners or operators was not exhaustive. See *id.*

193. See *Schiavone*, 79 F.3d at 255.

194. *Id.* (quoting *Lansford-Coaldale*, 4 F.3d at 1221 n.11).

195. *Id.* (quoting *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990)).

196. *Id.*

potentially directly liable.¹⁹⁷ The Sixth Circuit, however, misinterpreted the remedial nature of the statute by holding that a parent corporation could only be indirectly liable.¹⁹⁸

By imposing liability on parent corporations under a piercing the corporate veil standard, the Sixth Circuit also frustrated Congress' intent in enacting CERCLA.¹⁹⁹ The Sixth Circuit's piercing test adheres to traditional rules of limited corporate liability.²⁰⁰ There is some evidence, how-

197. See *id.* at 253 ("An interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of the legislation."); see also *Lansford-Coaldale*, 4 F.3d at 1221 n.11 (noting broad definition of person indicates intent to hold parent corporations liable); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993) (finding parent corporations among list of potentially responsible parties, reflecting "CERCLA's 'essential purpose' of making 'those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.'" (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986))); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990) (finding legislative history to indicate intent to impose liability on "'classes of persons without reference to whether they caused or contributed to the release or threat of release'" and concluding that it "reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA" (quoting *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985))).

198. See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 579 (6th Cir.) (en banc) (omitting any discussion of broad definition of person), *cert. granted*, 118 S. Ct. 621 (1997). In fact, the Sixth Circuit did not even have to address the issue of whether a parent corporation is a person within the meaning of the statute because the parties previously stipulated to the fact that they were all persons within the definition of CERCLA. See *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 556 (W.D. Mich. 1991) ("The parties have stipulated . . . that CPC, MDNR, Aerojet, Cordova/California and Cordova/Michigan are 'persons,' as defined under CERCLA's relevant provisions."), *aff'd in part, rev'd in part sub nom. United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir.) (en banc), *and cert. granted*, 118 S. Ct. 621 (1997). On the contrary, the court was free to include parent corporations in the definition of owner or operator. See 42 U.S.C. § 9601(20) (1994) (noting that "[t]he term 'owner or operator' means . . . any person owning or operating" facility). Rather than construing the statute with its remedial purposes in mind, the Sixth Circuit concentrated on a different definition of "owned or operated" provided by CERCLA. See *Cordova Chemical*, 113 F.3d at 579 (contrasting usual "owner or operator" definition with definition when facility has been conveyed to state or local government). When someone conveys a facility to the government, an "owner or operator" of a facility that has been conveyed to the government is one who "owned, operated or otherwise controlled activities at such facility immediately" before the owner transferred the property. 42 U.S.C. § 9601(20)(A)(iii). The court found that because Congress included a control test in this definition and not the other, the drafters distinguished between those that controlled the facility and those that operated it. See *Cordova Chemical*, 113 F.3d at 579 ("It thus appears that the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility."). This conclusion is called into doubt, however, by the court's own hypothetical that designates a party hired to run the "daily . . . operation" of a facility, presumably to control the facility's operations, an "operator." *Id.*

199. See *Lansford-Coaldale*, 4 F.3d at 1221 (noting congressional intent to make responsible parties pay for cleanups).

200. See *Cordova Chemical*, 113 F.3d at 580 (holding that liability will depend

ever, which indicates that Congress intended to expand parent liability for a subsidiary's activities beyond traditional limited liability principles.²⁰¹ For example, the Third Circuit, relying on CERCLA's language, found that "Congress has expanded the circumstances under which a corporation may be held liable for the acts of an affiliated corporation such that, when a corporation is determined to be the operator of a subsidiary . . . corporation, traditional rules of limited liability for corporations do not apply."²⁰²

In support of its adoption of the piercing the corporate veil test, the Sixth Circuit found that the specific goals of CERCLA were difficult to discern and that courts cannot use the remedial nature of the statute "as a reason for filling in the blanks left by this sketchy legislative history [in order] to impose liability under nearly every conceivable scenario."²⁰³ It is generally accepted that courts must not go beyond "reasonable bounds" in liberally construing a statute.²⁰⁴ There is evidence, however, that Congress intended the courts "to develop a federal common law to supplement the statute."²⁰⁵ For example, during the debates on CERCLA, Representative Florio stated, "[t]o insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in States with more lenient laws, the bill

on whether there is sufficient evidence to warrant piercing corporate veil). Under traditional rules of limited liability, a parent corporation typically is not liable for the debts and obligations of its subsidiary. See *FLETCHER ET AL.*, *supra* note 3, § 25, at 513 (stating that corporations are distinct entities with different rights and liabilities than their shareholders). Despite their separate existence, however, courts will pierce the corporate veil when it is in the interests of justice. See *id.* § 41, at 602-03 (finding practically all authorities agree courts may disregard corporate separateness in cases of fraud, contravention of law or contract or public wrong).

201. See *Lansford-Coaldale*, 4 F.3d at 1221 (interpreting liability under statute to extend beyond limited liability); see also *Schiavone*, 79 F.3d at 253 (finding that there is "perceived tension between direct liability and liability based on veil piercing," but imposing operator liability directly on parent corporations "is consistent with the general thrust and purpose of the legislation"); *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (stating that under traditional concepts of corporate law, shareholder would be protected from liability for acts of valid corporation, "[h]owever, CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act").

202. *Lansford-Coaldale*, 4 F.3d at 1221. The court noted the broad language of CERCLA supported the view that "notwithstanding the traditional rule of limited liability in the corporate context," parent corporations could be directly liable. *Id.* at 1221 n.11. The court relied on the definitions of operator and person, finding they indicate an intent to hold parent corporations liable if they are "determined to have operated the facility." *Id.*

203. *Cordova Chemical*, 113 F.3d at 578.

204. See *ENDLICH*, *supra* note 29, § 110, at 146 (finding limits to principle that courts can extend statute beyond express language); 3 *SINGER*, *supra* note 29, § 60.01, at 55 (explaining that courts must stay within prerogatives of legislature).

205. *Mobay Corp. v. Allied-Signal Inc.*, 761 F. Supp. 345, 347 (D.N.J. 1991) (quoting *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988)).

will encourage the further development of a Federal common law" regarding CERCLA.²⁰⁶ Therefore, it is apparent that to impose direct liability on a parent corporation that actively participates in its subsidiary's business operations comports with CERCLA's remedial purpose.²⁰⁷ In addition, it is equally apparent that the Sixth Circuit's more stringent piercing the corporate veil standard conflicts with remedial statutory construction principles and hinders Congress' goals in enacting the statute.²⁰⁸

C. *Statutory Language Supports Direct Liability Standard*

In addition to erroneously imposing a culpability requirement in CERCLA and hindering its congressional goals, the Sixth Circuit also misinterpreted the plain language of the statute.²⁰⁹ Liability under CERCLA attaches if a party owned or operated a facility at the time a release or threatened release of hazardous materials occurred.²¹⁰ The statute defines "owner or operator" as "any person owning or operating such facility."²¹¹ Although the definition is not very helpful in determining the exact meaning of the words "owner or operator," the use of "or" implies that owners and operators are two separate classes of liable parties under the statute.²¹²

The First Circuit in *Kayser-Roth* was one of the first appellate courts to

206. 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio).

207. See *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) ("An interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of the legislation."); *Lansford-Coaldale*, 4 F.3d at 1221 n.11 (adopting actual control standard because statute's language "indicates an intent to hold a corporation liable . . . if it is otherwise determined to have operated the facility in question").

208. See *Lansford-Coaldale*, 4 F.3d at 1221 (construing CERCLA broadly and finding that Congress intended to expand liability under statute so that "traditional rules of limited liability for corporations do not apply").

209. Compare 42 U.S.C. § 9607(a)(2) (1994) (stating that any person who owned or operated facility is liable), with *United States v. Cordova Chem. Co.*, 113 F.3d 572, 581 (6th Cir.) (en banc) (stating that owner liability attaches with veil piercing, and as result, parent not liable as operator because veil piercing was not warranted), cert. granted, 118 S. Ct. 621 (1997).

210. See 42 U.S.C. § 9607(a)(2) (stating that any person who "owned or operated . . . facility" at time hazardous substances were disposed of shall be liable for remediation costs).

211. *Id.* § 9601(20)(A)(ii).

212. See *Schiavone*, 79 F.3d at 254 ("Observing that 'owner' liability and 'operator' liability denote two separate concepts, courts stress the disjunctive character of CERCLA liability."); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (finding owners and operators to be separate kinds of liable parties); *Lansford-Coaldale*, 4 F.3d at 1220 (noting there is general agreement that "'owner' liability and 'operator' liability denote two separate concepts" of liability); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990) ("Congress, by including a liability category in addition to owner ('operators') connected by the conjunction 'or,' implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership.").

consider the issue of owner or operator liability.²¹³ The court began its analysis of whether a parent corporation could be directly liable as an operator by looking at the grammatical construction of the statute.²¹⁴ The court found it significant that CERCLA imposes liability on one who owned *or* operated a facility.²¹⁵ On the basis of this language, the court concluded that "Congress, by including a liability category in addition to owner ('operators') connected by the conjunction 'or,' implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership."²¹⁶

The Sixth Circuit, however, failed to distinguish between an owner and an operator, using the terms seemingly interchangeably.²¹⁷ For example, when the court summarized its holding concerning the liability of CPC, it stated one possible liability scenario was "as an *owner*, by piercing the corporate veil."²¹⁸ Later, however, after concluding that the veil piercing standard was the only reliable measure of liability, the court stated it must reverse "the district court's finding of *operator* liability" regarding CPC.²¹⁹

The Sixth Circuit's failure to distinguish between an owner and an operator is significant because there are two separate standards of liability for owners and operators.²²⁰ The United States District Court of Rhode Island addressed the issue of parent corporation operator liability:

Ordinarily, a parent corporation cannot be deemed an operator based solely upon its status as a shareholder. The fact that a subsidiary was a member of the classes of persons potentially liable

213. See *Kayser-Roth*, 910 F.2d at 24 (noting that case was decided August 2, 1990).

214. See *id.* at 26 (examining definitions and language of CERCLA).

215. See *id.*

216. *Id.* The Third Circuit in *Lansford-Coaldale*, adopted the First Circuit's interpretation, finding that "[t]here is general agreement that under CERCLA, 'owner' liability and 'operator' liability denote two separate concepts." *Lansford-Coaldale*, 4 F.3d at 1220.

217. See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 581 (6th Cir.) (en banc) (holding piercing corporate veil could result in *owner* liability, then declining to hold defendant liable as *operator* under same standard), *cert. granted*, 118 S. Ct. 621 (1997). At first glance, it appears that the Sixth Circuit recognized a difference between owners and operators in that the structure of its analysis seems to distinguish between the two. See *id.* at 582-83 (using different owner and operator liability analysis for Aerojet and its subsidiaries). In adjudging CPC's liability, however, the court did not distinguish between owner and operator liability. See *id.* First, the structure of the court's analysis does not differentiate the two standards; instead, the court deals with CPC's owner or operator liability in the same section. See *id.* at 578-81. Second, in assessing CPC's liability, the court uses the terms "owner" and "operator" seemingly interchangeably. See *id.* at 581.

218. *Id.* (emphasis added).

219. *Id.* (emphasis added).

220. See *Lansford-Coaldale*, 4 F.3d at 1220 (noting that separate concepts of owner and operator liability "require two separate standards for determining whether they apply").

under CERCLA and that the parent had a substantial ownership interest in the subsidiary is insufficient to establish that the parent was an operator for CERCLA's purposes.²²¹

Rather, operator liability is a question of the degree of control that the parent corporation exercised over the subsidiary's operations, management and environmental policies.²²²

Conversely, owner liability is literally imposed on the party that is deemed to have owned the contaminated facility.²²³ Generally, an owner is the party that holds title to the contaminated site.²²⁴ A parent corporation, however, while not actually holding title to a facility, can be held liable as an owner because "[i]mputing CERCLA liability upon a parent corporation by piercing the corporate veil is, in essence, concluding that the parent is an owner for CERCLA's purposes."²²⁵ Therefore, in most cases, an owner may be an operator if it exercises the requisite degree of

221. *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 22 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990).

222. *See id.* ("Kayser-Roth's liability as an operator turns on the issue of control."). The court found it "uncontroverted" that the subsidiary was within the class of potentially liable parties under CERCLA and that Kayser-Roth, "as sole owner and shareholder" of Stamina Mills, the subsidiary, "had a substantial financial and ownership interest" in the subsidiary. *Id.* Therefore, "[t]he question becomes whether Kayser-Roth exercised control over Stamina Mills management and operations sufficient to find that Kayser-Roth was a de facto operator." *Id.* The court then discussed a number of factors that it relied on in holding Kayser-Roth directly liable as an operator. *See id.*

223. *See Lansford-Coaldale*, 4 F.3d at 1225 (noting that owner liability can attach only if defendant "meets the common definition of that term").

224. *See* BLACK'S LAW DICTIONARY 1105 (6th ed. 1990) (defining owner as "[t]he person in whom legal title is vested the ownership, dominion, or title of property"). The Third Circuit addressed the owner liability issue for a parent corporation:

[W]hile Congress has provided little guidance in CERCLA as to the appropriate standard governing owner liability, . . . it is nonetheless clear that owner liability can ordinarily only attach if the defendant meets the common definition of that term and is at least a partial owner of the corporation responsible for the substantive CERCLA offenses. Thus, in contrast to operator liability, corporate ownership is generally a pre-requisite for this status to apply

Lansford-Coaldale, 4 F.3d at 1225.

225. *Kayser-Roth*, 724 F. Supp. at 23. A corporation is regarded as an entity separate from its shareholders. *See* FLETCHER ET AL., *supra* note 3, § 25, at 512. As a result of the corporation's entity status, it can own property in its own name. *See* COOK, *supra* note 6, at 18 (noting corporations have power to purchase and hold land and chattels); FLETCHER ET AL., *supra* note 3, § 25, at 512 (finding corporation capable of "possessing and owning real and personal property in its own name"); HENN, *supra* note 3, § 78, at 89 (stating one attribute of modern corporation is power to "take, hold, and convey property in the corporate name"). When courts pierce the corporate veil, however, the court disregards the separateness of the corporation and its shareholders, and treats them as the same entity. *See* FLETCHER ET AL., *supra* note 3, § 41, at 603. Therefore, when a court pierces a corporation's corporate veil, the court considers the owners of the corporation as the owners of the corporation's property. *See id.*

control over the facility, but an operator will not necessarily be an owner.²²⁶ As such, courts cannot appropriately impose the same standard of liability on parent corporations in determining both owner and operator liability.²²⁷ The Sixth Circuit, then, by failing to distinguish between owners and operators, inappropriately collapsed the standard for adjudging parent corporation liability into the more stringent piercing the corporate veil standard.²²⁸ Because the premise for the Sixth Circuit's holding was a misinterpretation of the plain language of the statute and the standard that it adopted fails to recognize the two classes of liable parties intended by CERCLA, the court's holding is questionable.²²⁹

D. Direct Parental Liability Will Not Have a Chilling Effect on Facility Remediation

The Sixth Circuit rejected the district court's direct liability standard for parent corporation liability in part because it feared "the threat of unlimited liability [would] . . . deter private sector participation in the cleanup of existing sites."²³⁰ The circuit court's concern is unwarranted.²³¹ Recent developments in environmental law limit the potential liability of prospective purchasers of contaminated sites, as well as the lenders financing those purchases.²³²

226. See *Kayser-Roth*, 724 F. Supp. at 23 ("While an owner may be, in most cases, an operator, the converse is not necessarily true.").

227. See *id.* (finding two classes of liable parties that can, but do not have to include similar parties). It necessarily follows that for there to be two classes of liable parties, there must also be two standards for determining who qualifies as a member of each class. See *id.* at 22-23 (applying piercing corporate veil standard for owner liability and actual control standard for operator liability).

228. See *Lansford-Coaldale*, 4 F.3d at 1220 (discussing appropriate liability standards for owner liability and operator liability). The court stated:

Under CERCLA, a corporation may be held liable as an owner for the actions of its subsidiary corporation in situations in which it is determined that piercing the corporate veil is warranted. . . . Operator liability, in contrast, is generally reserved for those situations in which a parent or sister corporation is deemed, due to the specifics of its relationship with its affiliated corporation, to have had substantial control over the facility in question.

Id.

229. Compare 42 U.S.C. § 9607(a)(2) (1994) (imposing liability on two classes—owners and operators), with *United States v. Cordova Chem. Co.*, 113 F.3d 572, 581 (6th Cir.) (en banc) (interpreting CERCLA to impose liability on owner or operator as same class of responsible parties), *cert. granted*, 118 S. Ct. 621 (1997).

230. *Cordova Chemical*, 113 F.3d at 580.

231. For a discussion of how investment will not be deterred, including an example of private sector participation in a jurisdiction imposing direct parent operator liability, see *infra* notes 233-44 and accompanying text.

232. See Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (E.P.A. 1995) [hereinafter 1995 EPA Guidance] (announcing prospective purchaser agreements and providing guidance thereon); see also Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 42 U.S.C. §§ 6991b(h), 9601(20), 9607 (1994

In 1995, the EPA announced the "Brownfields Action Agenda," which included several initiatives designed to promote the redevelopment of abandoned, contaminated sites, otherwise known as brownfields.²³³ As a part of the agenda, the EPA clarified and encouraged the use of the pro-

& Supp. 1997)) (amending CERCLA by limiting liability of lenders for cleanup costs).

233. See 1995 EPA Guidance, *supra* note 232, at 34,792-98 (listing initiatives designed to remove "liability barriers" that hinder brownfields redevelopment). By definition, "brownfields" are "abandoned, idled, or under-used industrial or commercial sites that are not being expanded or developed because of real or perceived environmental contamination." Robert W. Wells, Jr., *Brownfields for Beginners*, FLA. B.J., May 1997, at 74, 74. Although these sites are not contaminated enough to be included on CERCLA's National Priority List, before the EPA's initiative, purchasers of these sites were still potentially subject to Section 107(a) liability. See *id.* at 74 n.9 (noting that brownfields sites are not so contaminated as to be on National Priorities List, but subsequent purchaser of property could be liable as owner); see also Margaret Murphy, *Brownfields Sites: Removing Lender Concerns as a Barrier to Redevelopment*, 113 BANKING L.J. 440, 442-43 (1996) (discussing effect of this potential liability on purchasers). One commentator noted:

By [statutory] definition, . . . brownfields are not sufficiently contaminated to merit ranking on the National Priorities List, [but] . . . [p]otential purchasers . . . are reluctant to buy brownfields because of strict federal and state cleanup liability laws such as Superfund that can potentially impose cleanup liability on owners of brownfields regardless of whether they contributed to the contamination.

Id. In contrast to brownfields are "greenfields." Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 273 (1997). Greenfields are previously unused properties, in which the potential for hazardous waste contamination is slight. See *id.*

The EPA's brownfields agenda consists of five initiatives. See Murphy, *supra*, at 453-54. First, the EPA deleted approximately 24,000 sites from the National Priorities List to "remove the stigma of potential environmental liability accompanying the listing of these sites and to encourage redevelopment." Grant R. Trigger et al., *Making Brownfields Green Again: How Efforts to Give Urban Centers an Economic Facelift Have Changed the Face of Environmental Policy*, MICH. B.J., Jan. 1997, at 42, 43; see Murphy, *supra*, at 453-54 (noting concerns of lenders with "specter of federal liability associated with properties" suspected of contamination and hesitancy of lenders to lend for their development). One commentator stated:

One key concern of lenders is the specter of federal liability associated with properties where there is suspected contamination. Because the mere listing of a site on the Superfund tracking list is enough to deter some lenders, the removal of sites from CERCLIS [the Comprehensive Environmental Response, Compensation, and Liability Information System] should help to alleviate some of these fears.

Id. Second, the EPA announced its intention to fund 50 brownfield pilot programs nationwide at up to \$200,000 each. See *id.* at 454-55 ("EPA hopes to develop a nationwide plan of action based on what it learns from conducting these projects."). Third, the EPA issued guidance on prospective purchaser agreements (PPAs), specifying the conditions under which the EPA would enter into such an agreement. See *id.* at 455. Fourth, the EPA attempted to exclude lenders from cleanup liability. See *id.* at 456. Congress codified this rule in the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, 42 U.S.C. §§ 6991b(h), 9601(20), 9607 (1994 & Supp. 1997), which amended the lender liability provisions of CERCLA. Finally, the EPA delegated some parts of the CERCLA program to the states. See Murphy, *supra*, at 459.

spective purchaser agreement (PPA).²³⁴ A PPA is an agreement negotiated between the EPA and a purchaser, whereby the EPA covenants not to sue the prospective purchaser of a contaminated site, in exchange for a "public benefit," usually in the form of financial or in-kind assistance with the cleanup.²³⁵ Accordingly, through the use of PPAs, companies can purchase and remediate contaminated property without fear of unlimited CERCLA liability and a rule imposing direct liability on parent corporations will not deter private sector investment in cleanups.²³⁶

234. See Murphy, *supra* note 233, at 455-56 (stating that EPA issued "guidance" on PPAs). The guidance established four criteria to determine the appropriateness of a PPA:

- 1) Enforcement action is anticipated by EPA; 2) A direct cleanup benefit or indirect economic benefit will occur; 3) The operation of the site will not aggravate or contribute to contamination, or pose health risk[s] to the community or persons likely to be present at the site; and 4) The prospective purchaser is a financially viable party.

Id. Although PPAs are included in the EPA's brownfields agenda, the fact that anticipated enforcement action by the EPA is a prerequisite to a PPA indicates that they can be used at sites on the National Priorities List, in addition to true brownfields. *Cf. id.* at 243 n.6, 454-56 (noting that EPA initiates CERCLA enforcement action primarily from National Priorities List). The EPA previously introduced PPAs in 1989, but the original guidance to prospective purchasers was vague. *See id.* at 455. Because the criteria for PPAs was vague, prospective purchasers were reluctant to enter into agreements with the EPA, as evidenced by the fact that only 14 PPAs were entered into between 1989 and 1995. *See id.* The EPA intended the 1995 guidance to "supersede and broaden" the 1989 guidance and because of its increased specificity, many commentators believe more agreements will be entered into in the future. *See* Walsh, *supra* note 37, at 206 ("[E]xperts have predicted that the new guidance will produce many more agreements.").

235. See Murphy, *supra* note 233, at 455 ("A PPA generally requires a purchaser of contaminated property to commit to a specific cleanup as well as make a payment to EPA in return for a covenant not sue from EPA."); Trigger et al., *supra* note 233, at 43 (noting that guidance includes "EPA's provision of a covenant-not-to-sue to the prospective purchaser if the redevelopment of the land will result in a 'substantial direct benefit' to the EPA . . . or in a 'substantial indirect benefit' to the community and some 'lesser direct benefit' to the EPA"). PPAs also provide protection from suit by other federal agencies under different environmental laws, by the United States and by third parties in the form of contribution protection for subsequent claims. *See* Murphy, *supra* note 233, at 456. In addition, "[l]iability protection would extend to subsequent transferees of the property." Walsh, *supra* note 37, at 206. Protection from liability to third parties "for claims by adjoining property owners for loss of property value, stigma damages, or personal injury," however, is not dealt with in current PPAs. Wells, *supra* note 233, at 77. In return for the release from liability, the prospective purchaser is required to provide a benefit, either to the EPA or to the community in which the site is located. *See* Scott H. Reisch, *Reaping "Green" Harvests from "Brownfields": Avoiding Lender Liability at Contaminated Sites: Part I*, COLO. LAW., Jan. 1997, at 3, 6. The "public benefit" can be either direct or indirect. *Id.* Direct benefits include giving the EPA "funds for or in kind assistance with the cleanup." *Id.* Indirect benefits are those benefiting the community where the facility is located, including "cleanup, creation of jobs, and redevelopment of abandoned areas." *Id.* Finally, a purchaser can provide a combination of direct and indirect benefits. *See id.*

236. *Cf.* Walsh, *supra* note 37, at 206 (discussing liability protection offered to prospective investors in brownfields). PPAs do not have the force of a statutory amendment to CERCLA's liability provisions, however, they are an important step

Private sector investment in cleanups requires sufficient capital to remediate contaminated sites, which frequently requires outside financing.²³⁷ Prior to 1996, however, lending institutions were “justifiably reluctant” to loan funds for projects that could potentially expose them to environmental liability.²³⁸ In 1996, however, Congress enacted the Asset

towards protecting and thereby encouraging investors to participate in the remediation of contaminated property. See Trigger et al., *supra* note 233, at 43 (recognizing PPAs are one EPA action to “clarify and diminish liability concerns” in investment in contaminated property); see also Murphy, *supra* note 233, at 456 (stating that lenders, key players in redevelopment, are protected from liability when borrower has PPA). If, as the Sixth Circuit asserts, the threat of unlimited CERCLA liability will hinder private sector investment in contaminated properties, then agreements precluding that liability will remedy the situation and investment will not be deterred. Compare *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir.) (en banc) (stating direct liability standard for parent corporations will deter investment in cleanup of contaminated properties), *cert. granted*, 118 S. Ct. 621 (1997), with Steve Taylor, *New Environmental Bonanza . . . Brownfields Means Greenbacks for Leading Environmental Practices*, OF COUNS., May 20, 1996, at 4, 4 (noting that as new laws “have exempted or shifted liability from potential buyers, . . . ‘brownfields’ are beginning to attract investors”).

237. See Murphy, *supra* note 233, at 465 (noting that many developers lack sufficient funds to remediate brownfields and must, therefore, secure outside financing).

238. See Scott H. Reisch, *Reaping “Green” Harvests From “Brownfields”: Avoiding Lender Liability at Contaminated Sites: Part II*, COLO. LAW., Feb. 1997, at 9, 9-10 (explaining how lending practices of past should change); see also H. Edward Abelson, *Environmental Risks for Lenders*, in COMMERCIAL REAL ESTATE FINANCING 1997, at 545, 549 (PLI Real Est. Law & Practice Course Handbook Series No. N4-4603, 1997) (“The most significant potential risk faced by lenders with respect to . . . hazardous material issues is the possibility that the lender becomes directly responsible for site assessment and cleanup costs associated with a particular property.”); Murphy, *supra* note 233, at 441 (asserting key barrier to brownfields development is banks’ reluctance to loan money because of potential lender liability); cf. Charles F. Lettow & Joyce E. McCarty, *New Law Protects Banks from Pollution Cleanup Liability*, BANKING POL’Y REP., Mar. 3, 1997, at 1, 12-13 (noting that “[a]fter living in fear for years about the potential for being held unfairly liable for millions of dollars in cleanup costs for environmental pollution caused by others, bankers should be drawing a collective sigh of relief” because of new lender liability law). Section 9601(20)(a) of CERCLA exempts from liability a “person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest.” 42 U.S.C. § 9601(20)(A) (1994). Initially, courts interpreted this definition to exclude lenders from CERCLA liability unless they were involved in the day-to-day operations of the facility or environmental decision making. See Abelson, *supra*, at 561 (noting *Fleet Factors* court went “significantly beyond the previous district court decisions in this area”). The Eleventh Circuit, however, held that “a lender’s mere power to affect and influence a borrower’s operations might be sufficient to lead to liability on the part of the lender” in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990). Lettow & McCarty, *supra*, at 13. As a result of this decision, many lenders simply refused to lend on contaminated property. See Abelson, *supra*, at 562. Following *Fleet Factors*, the EPA issued a rule interpreting the liability exception in CERCLA, but the United States Court of Appeals for the District of Columbia determined the EPA did not possess the power to issue such a rule and vacated it. See *Kelley v. EPA*, 15 F.3d 1100, 1107-08 (D.C. Cir. 1994) (noting that, in enacting CERCLA, Congress reserved resolution of liability issues to judiciary). As a result, the EPA promulgated

Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 ("the 1996 Lender Liability Act"),²³⁹ which prohibits the imposition of liability on lending institutions, except when the lender exercises pervasive control over the contaminated facility.²⁴⁰ Therefore, the act protects lenders, thereby encouraging them to loan the funds to remediate contaminated sites.²⁴¹ As a result, sources of sufficient capital are available to private sector investors, facilitating their participation in cleanups of contaminated sites.²⁴² Overall, contrary to the Sixth Circuit's assertion, a rule imposing direct CERCLA liability on parent operators will not deter private sector participation in site remediation.²⁴³ PPAs preclude future

the rule as a nonbinding guidance policy for the government in litigating CERCLA cases. See Lettow & McCarty, *supra*, at 14 (recognizing because policy could not bind states and private litigants, resulting uncertainty and divergence of judicial thought created "a risky, difficult situation for lenders").

239. 42 U.S.C. §§ 6991b(h), 9601(20), 9607 (1994 & Supp. 1997).

240. See *id.*; see also Reisch *supra* note 238, at 10 ("[T]he legislation specifically prohibits imposition of lender liability based on a lender's mere capacity to influence, or its unexercised right to control, operations at the contaminated property."); Trigger et al., *supra* note 233, at 44 (noting new law amends CERCLA "to codify and incorporate the provisions of the EPA's lender rule"). Under the statute, a lender could lose its liability exemption by either:

(1) "exercis[ing] decision-making control over environmental compliance at the facility such that it has undertaken responsibility for the hazardous substance handling or disposal practices" or (2) "exercis[ing] management responsibilities at a level comparable to the facility's manager over day-to-day environmental compliance or all of the operational functions of the facility other than environmental compliance."

Id. (alterations in original). Courts interpreting the law have held that it "effectively codifies the EPA rule." Lettow & McCarty, *supra* note 238, at 16 (quoting *Kelley v. Tiscornia*, No. 94-1403, 1996 WL 732323 at *7 (6th Cir. Dec. 19, 1996)).

241. See Lettow & McCarty, *supra* note 238, at 13 ("[T]he new law substantially reduces the risk of potential liability to lenders, and thus it should make credit more available, particularly for small businesses."). Specifically, the statute protects lenders in three ways. First, it establishes "safe-harbors" for lenders by allowing them to condition the loan on environmental compliance, to require a borrower to cleanup the contaminated property, to advise the borrower to lessen any diminution in property value and to conduct a cleanup itself. See Reisch, *supra* note 238, at 9-10. Second, the statute also "allows a lender to foreclose on contaminated property and proceed to liquidate assets, maintain business activities, or wind-up operations without incurring CERCLA liability." *Id.* at 10. Third, following foreclosure, a lender "may act to preserve the value of the property while it is trying to sell it," including taking limited cleanup actions. *Id.*

242. See Abelson, *supra* note 238, at 567-68 (noting that lender liability statute provides certainty regarding CERCLA liability, which reduces risk associated with such loans). Lenders are more comfortable with lending to remediate contaminated sites because the statute reduces the risks associated with the lending. See *id.* at 568. As a result, their ability to successfully make these loans has also increased. Lettow & McCarty, *supra* note 238, at 13. In addition, as more customers of lenders look to utilize brownfields, lenders, in order to stay competitive, are "forced . . . to more carefully evaluate these projects." Abelson, *supra* note 238, at 585. This has resulted in brownfields lending becoming "more of a mainstream activity." *Id.*

243. See *\$14-Million Settlement Reached in Pennsylvania*, MEALEY'S LITIG. REP., Apr. 11, 1996, at 1 (discussing settlement in recent CERCLA litigation involving brownfields site with PPA). The EPA settled CERCLA litigation concerning the

CERCLA liability for investors in contaminated property and these investors will have a source of sufficient capital to remediate the sites as a result of the 1996 Lender Liability Act.²⁴⁴

E. Direct Parent Liability Standard Results in a Relatively Uniform Application of the Law

The Sixth Circuit also rejected direct parent liability because it found the district court's test to be "nebulous," as opposed to the bright line rule of piercing the corporate veil.²⁴⁵ The court doubted other courts' ability to determine "[w]hen, precisely, . . . a parent [is] acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability."²⁴⁶ An examination of cases from circuits that have adopted the actual control direct liability standard, however, reveals that like piercing the corporate veil tests, courts apply certain factors to varying degrees, making the result no more or less uncertain than in piercing the corporate veil cases.²⁴⁷ Generally, under the actual control test, operator liability is appropriate when the parent exercises "active involvement in

cleanup of a Superfund site in Philadelphia. *See id.* At the time of the settlement, the EPA and Delaware Avenue Enterprises, an unrelated party to the litigation, entered into a PPA with the EPA. *See id.* Under the agreement, Delaware Avenue Enterprises and two affiliates will pay the EPA and the Commonwealth of Pennsylvania \$2.3 million and cooperate in future cleanup efforts. *See id.* In return, the EPA agreed not to impose liability on the purchasers for any past contamination. *See id.* This example of a PPA is noteworthy for two reasons. First, the parties entered into the PPA in 1994 under the 1989 EPA guidelines, which were considered vague and unreliable in the liability protection offered. *See id.* Second, Delaware Avenue Enterprises, through its affiliates, invested in the remediation of a site within a jurisdiction that adheres to the actual control standard for parent corporation liability. *See Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1222 (3d Cir. 1993) (adopting actual control standard for parent corporation operator liability). This example stands in direct opposition to the Sixth Circuit's assertion that the imposition of direct liability will deter private sector investment in cleanups and also stands as an example of how a PPA encourages such investment. *See United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir.) (en banc) (finding threat of liability will deter investment), *cert. granted*, 118 S. Ct. 621 (1997).

244. *See* Murphy, *supra* note 233, at 455 (noting that in return for commitment of direct or indirect benefit to EPA, prospective purchasers receive covenant not to sue from EPA); *see also* 42 U.S.C. §§ 6991b(h), 9601(20), 9607 (1994 & Supp. 1997) (prohibiting imposition of liability on lenders who loan money to remediate contaminated facilities).

245. *See Cordova Chemical*, 113 F.3d at 580 (explaining why district court's expansive approach to CERCLA remedies presents problems).

246. *Id.*

247. *See* John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 408 (1st Cir. 1993) (considering financial and managerial factors in determining whether to hold parent directly liable); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (finding parent exercised financial, managerial and environmental control over subsidiary); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1390-91 (N.D. Ill. 1988) (assessing whether parent's control over environmental, financial and managerial decisions was sufficient to impose liability).

the activities of the subsidiary.”²⁴⁸ The factors applied by courts ultimately consider whether the parent exerted a sufficient degree of control to be actively involved and therefore liable.²⁴⁹

In *Kayser-Roth*, the First Circuit affirmed the district court’s imposition of operator liability on the defendant parent corporation under the actual control standard.²⁵⁰ The First Circuit found that the parent corporation exerted “pervasive control” over its subsidiary through (1) total monetary control, including restricting the subsidiary’s budget, collecting its accounts payable and requiring approval for capital expenditures greater than \$5000; (2) control over its board of directors, in that parent corporation personnel occupied nearly all of the subsidiary’s officer and director positions; (3) a directive that all subsidiary-governmental contact go directly through the parent; and (4) control over environmental matters, including the power to prevent the release of hazardous materials.²⁵¹

The First Circuit relied on substantially similar factors in *John S. Boyd* to justify imposing direct operator liability.²⁵² There the court found that (1) the parent exercised monetary control over the subsidiary by requiring approval for all expenditures over \$5000 and approving its budget and (2) the parent exercised almost complete control over its subsidiary’s officers and board of directors.²⁵³

In *Rockwell International*, the District Court for the Northern District of Illinois also relied on similar factors in determining whether to hold a parent corporation liable as an operator.²⁵⁴ The court found that (1) the parent corporation had significant control over its subsidiary’s officers and

248. *Kayser-Roth*, 910 F.2d at 27.

249. See *Bancamerica Commercial Corp. v. Trinity Indus., Inc.*, 900 F. Supp. 1427, 1454 (D. Kan. 1995) (resolving whether parent is liable as result of exercising direct control over operations of subsidiary), *aff’d in part, rev’d in part*, 100 F.3d 792 (10th Cir. 1996); *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1241, 1280-81 (N.D. Iowa 1993) (examining evidence to see if parent exercised sufficient control to be held liable); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F. Supp. 345, 354 (D.N.J. 1991) (addressing issue of whether parent “exercised control over or actively participated in the subsidiary’s activities”); *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 22 (D.R.I. 1989) (“The question becomes whether . . . [the parent] exercised control over . . . [the subsidiary’s] management and operations sufficient to find that . . . [the parent] was a de facto operator.”), *aff’d*, 910 F.2d 24 (1st Cir. 1990).

250. See *Kayser-Roth*, 910 F.2d at 28.

251. See *id.* at 27. The court concluded that “[s]uch control is more than sufficient to be liable as an operator under CERCLA.” *Id.* at 28.

252. See *John S. Boyd*, 992 F.2d at 408 (holding parent corporation liable as operator under actual control standard).

253. See *id.* The *John S. Boyd* court found that the parent exercised complete control over its subsidiary’s officers and directors because the president of the subsidiary was also the president of a division of the parent corporation, the parent corporation appointed the president, the president reported directly to the parent corporation’s officials and the parent corporation selected the subsidiary’s directors. See *id.*

254. See *Rockwell Int’l Corp. v. IU Int’l Corp.*, 702 F. Supp. 1384, 1391 (N.D. Ill. 1988) (finding genuine issue of material fact to exist as to whether parent cor-

directors, including hiring or approving the hiring of officers, overlapping of officers between the parent and subsidiary and determining the responsibilities of the subsidiary's officers; (2) the parent corporation made public announcements that it operated the facility; and (3) the parent corporation exercised control over environmental decisions, including suggesting changes in hazardous substance disposal protocol.²⁵⁵

Four factors for determining whether to hold a parent corporation liable under the actual control standard can be derived from these three cases.²⁵⁶ First, courts consider whether the parent corporation exercises monetary control over its subsidiary.²⁵⁷ Second, the nature of the subsidiary's board of directors is relevant to the actual control determination, specifically the composition of the board, who appointed its members and to whom the members answer.²⁵⁸ Third, the public statements and dealings of the companies are also a factor.²⁵⁹ Fourth, courts consider

poration was operator of facility and denying parent's motion for summary judgment).

255. See *id.* at 1390-91. The court stated:

We view the following evidence as demonstrating sufficient participation in the management of and indicia of the actual exercise of control over the operations of the Facility to warrant a finding that . . . [the parent] was an operator of the Facility within the meaning of § 9607(a)(2) and therefore subject to liability as a responsible party.

Id.

256. See *John S. Boyd*, 992 F.2d at 408 (holding parent corporation liable because it had control over subsidiary's finances and management); *Kayser-Roth*, 910 F.2d at 27-28 (finding parent liable because it exercised control over subsidiary's finances, management, public image and environmental decisions); *Rockwell International*, 702 F. Supp. at 1390-91 (imposing liability on parent corporation because it controlled subsidiary's management, public image and environmental decisions).

257. See *John S. Boyd*, 992 F.2d at 408 (including fact that subsidiary needed approval for large expenditures as evidence of actual control by parent); *Kayser-Roth*, 910 F.2d at 27 (including "total monetary control" by parent over subsidiary as indicia of actual control).

258. See *John S. Boyd*, 992 F.2d at 408 (relying on fact that parent maintained presence among officers and directors of subsidiary, that president of subsidiary was also president of parent division, that president was appointed by chairman of parent and reported to parent's directors and that parent selected directors for subsidiary in holding parent liable as operator); *Kayser-Roth*, 910 F.2d at 27 (noting placement of parent personnel in subsidiary director and officer positions serves "as a means of totally ensuring that . . . [the parent's] corporate policy was exactly implemented and precisely carried out" (quoting *United States v. Kayser-Roth Corp.*, 724 F. Supp. 15, 18 (D.R.I. 1989), *aff'd*, 910 F.2d 24 (1st Cir. 1990))); *Rockwell International*, 702 F. Supp. at 1390-91 (discussing evidence that parent corporation controlled hiring practices for subsidiary's officers, that some parent officers were subsidiary officers and that parent controlled responsibilities of those officers).

259. See *Kayser-Roth*, 910 F.2d at 27 (finding evidence of actual control in fact that all subsidiary-governmental contact, including environmental matters, goes directly through parent); *Rockwell International*, 702 F. Supp. at 1391 (including parent's statements in public announcements that it operated contaminated facility as evidence of actual control).

whether the parent had control over the subsidiary's environmental decisions.²⁶⁰

Therefore, courts apply the same general factors in assessing parent corporation liability, indicating the standard is not as nebulous as the Sixth Circuit suggests.²⁶¹ Rather, the actual control test is a fact-specific inquiry applying the several factors to a given case to determine whether the imposition of liability is appropriate.²⁶² In practice, piercing the corporate veil tests are very similar to the actual control test in that courts conduct a fact-intensive analysis of a number of factors to determine whether to pierce the corporate veil.²⁶³ In comparison, the actual control standard is no more and no less predictable than the Sixth Circuit's piercing the corporate veil standard.²⁶⁴

260. See *Kayser-Roth*, 910 F.2d at 27 (including fact that parent controlled environmental decisions as factor in upholding liability); *Rockwell International*, 702 F. Supp. at 1391 (considering fact that parent corporation officials suggested changes in hazardous substance disposal procedures and reviewed requests to purchase environmental protection equipment evidence of actual control). The *Kayser-Roth* court noted, however, that

[a]lthough indicia of ability to control decisions about hazardous waste are indicative of the type of control necessary to hold a parent corporation liable as an operator, we do not think the presence of such indicia is essential, assuming there are other indicia of the pervasive control necessary to prove operator status.

Kayser-Roth, 910 F.2d at 27 n.8.

261. See *United States v. Cordova Chem. Co.*, 113 F.3d 572, 580 (6th Cir.) (en banc) (characterizing district court's actual control test as nebulous as opposed to bright-line doctrine of piercing corporate veil), *cert. granted*, 118 S. Ct. 621 (1997).

262. See *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 803 (D.N.J. 1996) ("The 'actual control' determination 'requires an inherently fact-intensive inquiry, involving consideration of the totality of the circumstances presented.'" (quoting *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1222 (3d Cir. 1993))); *Fishbein Family Partnership v. PPG Indus., Inc.*, 871 F. Supp. 764, 771 (D.N.J. 1994) ("A fact specific inquiry is required to determine whether a corporation exerts enough control over another to be given operator status under CERCLA." (quoting *John S. Boyd*, 992 F.2d at 408)). The factors courts rely on have varying importance, depending on the facts of the given case. See *Vineland Constr. Co. v. Universal-Rundle Corp.*, No. CIV.A.92-3115, 1994 WL 912254, at *5 (D.N.J. Dec. 30, 1994) (noting that "no one factor is dispositive, and each is important only to the extent it is evidence of substantial, actual control").

263. See *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 656 (N.D. Ohio 1995) (stating that piercing corporate veil analysis begins with fact specific "examination of factors" evidencing how subsidiary corporation operates and parent's relationship to that operation); *Kayser-Roth*, 724 F. Supp. at 23-24 (analyzing factors relevant to piercing parent corporation's veil in light of specific facts in case).

264. Compare *John S. Boyd*, 992 F.2d at 408 (applying actual control factors to fact-specific inquiry to determine whether imposition of operator liability was appropriate), with *Kayser-Roth*, 724 F. Supp. at 23 (applying piercing corporate veil factors to fact-specific inquiry to determine whether imposition of owner liability is appropriate).

V. CONCLUSION & IMPACT

Overall, the Sixth Circuit erred in adopting a piercing the corporate veil standard for operator liability. The court based its holding on a misinterpretation of the plain language and congressional goals of the statute, as well as minimally supported policy justifications. Despite the inherent flaws in the court's opinion, however, the *Cordova Chemical* standard, as the controlling precedent, will determine parent corporation operator liability in the Sixth Circuit. Under the *Cordova Chemical* piercing the corporate veil standard, a court is less likely to impose operator liability on a parent corporation.²⁶⁵ As a result, this decision may persuade corporations to incorporate subsidiaries that deal with hazardous substances in states within the Sixth Circuit, thereby decreasing the possibility of parent corporation operator liability.

Within the Sixth Circuit, one court has held that the *Cordova Chemical* decision also impacts other areas of CERCLA liability.²⁶⁶ The United States District Court for the Western District of Michigan extended the application of the *Cordova Chemical* standard to arranger liability.²⁶⁷ The court held that imposing liability based on piercing the corporate veil "has equal, if not stronger, application to [Superfund] arranger liability."²⁶⁸

Outside of the Sixth Circuit, this decision is not likely to have a significant impact. The United States Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have already addressed the issue of what standard should apply for adjudging parent corporation liability.²⁶⁹ In addition, when the remaining circuits

265. Compare *Cordova Chemical*, 113 F.3d at 580 (requiring "patent abuse of the corporate form" and "fraud" to pierce corporate veil), with *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996) (requiring substantial control over subsidiary for direct liability). To pierce, "[t]here must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." *Cordova Chemical*, 113 F.3d at 580. Imposing operator liability under the actual control standard, however, requires only "substantial control exercised by one corporation over the activities of the other." *Lansford-Coaldale*, 4 F.3d at 1221.

266. See *United States v. CPC Int'l, Inc.*, No. 96-680, 1997 U.S. Dist. LEXIS 14154, at *1 (W.D. Mich. Aug. 11, 1997) (applying *Cordova Chemical* operator standard to adjudge parent corporation's arranger liability).

267. See *id.* (refusing to hold parent corporation liable as arranger because veil piercing was not warranted).

268. *CPC International*, 1997 U.S. Dist. LEXIS 14154, at *3.

269. See *American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 n.8 (9th Cir. 1995) (stating liability standard that court would apply as "if the evidence indicates [parent corporation] had 'substantial control' over the facility"), *opinion modified*, 95 F.3d 1156 (9th Cir. 1996); *Schiavone*, 79 F.3d at 255 (applying direct liability, actual control standard to determine parent corporation operator liability); *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 808-09 (8th Cir. 1995) (adopting "actual control" liability standard for adjudging United States' operator liability, which court equates with corporate liability); *Sidney S. Arst v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 421 (7th Cir. 1994) (holding president and vice-president of corporation liable as operators under actual con-

address this issue, it is not likely that they will follow the Sixth Circuit for two reasons. First, the Sixth Circuit is in the distinct minority.²⁷⁰ Second, the *Cordova Chemical* decision is based on an incorrect interpretation of CERCLA and it hinders Congress' goals in enacting the statute. Until the Supreme Court decides what standard courts should apply in determining parent corporation liability, courts will continue to disagree as to the appropriate liability standard and a parent corporation's risk of operator liability will remain jurisdiction specific.²⁷¹ In the meantime, the actual control standard most closely resembles CERCLA's statutory language and its congressional intent.

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trol standard); *Lansford-Coaldale*, 4 F.3d at 1220-21 (adopting actual control standard for parent corporation liability); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993) (finding parent corporation was not liable as operator because it did not "exercise[] actual and pervasive control of the subsidiary"); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 836 (4th Cir. 1992) (holding corporate principles directly liable as operators under authority to control standard); *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991) (considering whether majority shareholder was operator under actual participation in wrongful conduct standard); *Kayser-Roth*, 910 F.2d at 27 (holding parent corporation liable as operator under "active involvement in the activities of the subsidiary" standard).

270. See *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 83-84 (5th Cir. 1990) (holding that parent corporation can be liable only if piercing corporate veil is warranted). The Fifth Circuit is the only other court to adopt a piercing the corporate veil standard for parent corporation operator liability. See *id.* at 82-83 (recognizing that other circuits apply direct liability standard). A year after *Joslyn Manufacturing*, however, the Fifth Circuit applied the actual control standard in determining whether to hold a majority shareholder liable. See *Riverside*, 931 F.2d at 330 (deciding issue of owner and operator liability under CERCLA without reference to *Joslyn Manufacturing*).

271. See *Chandler & Grosser*, *supra* note 3, at 25 (urging Supreme Court to grant certiorari and establish "a uniform rule of law" for parent corporation operator liability).